Supreme Court, U.S.
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No. __-___

In the

Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

Cassandra COLLINS,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Davis v. United States*, 512 U.S. 452 (1994), this Court held that in order to trigger the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which deems *per se* invalid any confession or *Miranda* waiver following a suspect's request for the assistance of counsel, the suspect must "unambiguously" invoke his right to counsel.

The question presented here is whether *Davis*' clear-invocation rule applies only after a suspect has waived his *Miranda* rights and then, during interrogation, makes an ambiguous reference to a lawyer or, instead, also applies when the suspect ambiguously references a lawyer during the initial *Miranda* colloquy. There is a deep and entrenched split of authority on that question, which this case squarely implicates. The court below held that *Davis*' clear-invocation rule applies only in the post-waiver setting, as have the courts in Alaska, Maine, Maryland, South Dakota, and Utah. By contrast, the Seventh and Tenth Circuits, along with the state courts in Arkansas, California, the District of Columbia, Georgia, Illinois, Kansas, Michigan, Montana, Nevada, Oklahoma, and Wyoming, have held that *Davis* applies pre-waiver, as well.

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DECISIONS BELOW

The decision of the Circuit Court of Montgomery County suppressing Collins' confession is not reported. The suppression-hearing transcript, which culminates in the trial judge's decision, is reproduced at App. 17a-26a.

The decision of the Alabama Court of Criminal Appeals affirming the trial court's suppression of Collins' confession is reported at *State v. Collins*, __ So. 2d __, 2005 WL 182727 (Ala. Crim. App. Jan. 28, 2005), and reproduced at App. 1a-16a.

The decision of the Alabama Supreme Court quashing the State's writ of certiorari is reported at *State v. Collins*, __ So. 2d __, 2006 WL 438695 (Ala. Feb. 24, 2006), and is reproduced at App. 27a.

STATEMENT OF JURISDICTION

On January 28, 2005, the Alabama Court of Criminal Appeals entered a final judgment affirming the trial court's decision suppressing Collins' confession. On February 24, 2006, the Alabama Supreme Court quashed the State's writ of certiorari. Because the Alabama Supreme Court declined to exercise discretionary review, this Court has jurisdiction under 28 U.S.C. §1257[1] to review the Court of Criminal Appeals' final judgment. *See, e.g., Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968). This petition is timely because it is filed "within 90 days after entry of the order [of the Alabama Supreme Court] denying discretionary review." Sup. Ct. R. 13.1.

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[1] *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (pre-trial suppression order is "final judgment" within meaning of §1257).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Facts Pertaining to the Crime and the Confession

The following facts are taken from Collins' videotaped statement to police: In July 2001, Collins was a patient care technician at Baptist Medical Center in Montgomery, Alabama. *See* Supp. Clerk's Record ("Supp. CR") 13. On the evening of Friday, July 20, 2001, Collins "had maybe a couple of aspirins and maybe a beer or two" around 9:00 or 10:00 p.m. and then reported to work at 11:30 p.m. *Id.* at 16-17. Because she was not feeling well, she left work sometime between 1:00 and 2:00 a.m. on Saturday to get something to eat. *See id.* at 16. At approximately 3:15 a.m., Collins was "traveling down the road," "probably ... speeding" and not "paying any attention to the road at all." *Id.* at 18. Specifically, she was "[f]ooling around in [her] back seat trying to get [her] purse and [her] money before [she] arrived at Krystal," where she was going to buy some food. *Id.*

Collins continued: "As I was turned around not focusing on the road I hit something, my car swerved and I pulled back straight and I proceeded down the road, but then I looked up and my window and windshield was broken." *Id.* Collins turned her car around to see what she had hit. She saw a girl lying on the ground beside the road. *See id.* at 19. (The victim, not identified in the record, was 13-year-old Santana Scarbrough.) Collins said that she realized immediately that she "must have hit" the girl but that, rather than stopping to help, she "freaked out" and simply returned to her job at the hospital. *Id.* at 19-20. Collins admitted that she knew "that when you have an accident, whether anybody is hurt or not, that you are to leave the

vehicles where they're at and you're to call the police." *Id.* at 22. But even though she saw on the Saturday evening news that the girl she hit had died, Collins did not contact police until the following Thursday, July 26 – five days later. *See id.* at 21-22.

Police brought Collins in for an interview on Thursday afternoon. *See id.* at 14. Two officers – Corporals G.H. Humphrey and R.P. Spivey – were present. *See id.* Before any questioning began, Corporal Humphrey noted for the record that he had read Collins her *Miranda* rights earlier in the day and said that he was "gonna read them to [her] again." *Id.* After reading the *Miranda* warnings in full, Corporal Humphrey asked: "You understand those [r]ights I just read to you?" *Id.* at 15. Collins responded: "Okay, let me ask you a question, it says that ... I can have a lawyer, I will have to wait to get one." *Id.* When Corporal Humphrey replied, "[T]hat's correct," Collins asked, "I will have to wait till when?" *Id.* Corporal Humphrey did not answer that question but, instead, continued filling out a waiver-of-rights form for Collins' signature. *Id.*

About 10 seconds later, Corporal Humphrey placed the waiver form in front of Collins and asked her to read it aloud, which she did: "I fully understand the foregoing statement and do willingly agree to answer the questions. I understand and know what I am doing. No promise or threats have been made to me by anyone and no pressure of any kind has been made against me by anyone." *Id.* Corporal Humphrey then asked Collins if she understood her rights. Although Collins did not respond audibly, she signed the waiver-of-rights form. *See id.* at 12. Collins then answered the officers' questions and, as explained above, implicated herself in the hit-and-run manslaughter of Santana Scarbrough.

B. Proceedings Below

Collins filed a motion to suppress her statement to police. In support, she asserted two grounds: (1) that she

"did indeed invoke her *Miranda* right to counsel prior to being interrogated" and that the police did not "suspend[] the interrogation as they were required to do" under *Edwards v. Arizona*, 451 U.S. 477 (1981); and (2) that her subsequent written waiver was not voluntary, knowing, and intelligent under the totality of the circumstances. Clerk's Record ("CR") 6-7. As we will explain below, the lower courts never made it to Collins' second argument. Instead, they decided this case – and suppressed the statement – entirely on the basis that Collins' waiver was *per se* invalid because police did not terminate the interview immediately following Collins' ambiguous statement about counsel.

1. *Trial Court.* From the very outset of the hearing on Collins' suppression motion, the trial judge fixated on Collins' statement about counsel. After Collins' lawyer briefly introduced the case, the trial judge said that she wanted "to hear from the State" on the following issue: "When the officers were starting and reading her *Miranda* rights and the defendant, Ms. Collins, specifically said how long will it take to get an attorney, and neither one of the officers answered her, and they just pushed in front of her the *Miranda* rights form to sign, that she knowingly was waiving and understood them." App. 18a.

The prosecutor responded on two fronts. First, with respect to the question whether Collins understood and voluntarily waived her rights, he emphasized that "as the tape clearly shows, the [*Miranda*] rights were read to her" and that she "did sign her waiver form indicating that she did understand her rights as they were given to her." App. 19a. Second, and more importantly for present purposes, with respect to the issue that seemed to be bothering the trial court – namely, whether the officers should have terminated the interview immediately following Collins' statement about counsel – the prosecutor relied on this Court's decision in *Davis v. United States*, 512 U.S. 452 (1994):

> Judge, the case law is very clear where *Miranda* rights are considered, that the defendant has to have

> an affirmative request for an attorney before she can invoke her rights to have an attorney present and it has to be unequivocal and unambiguous as to whether or not she wants an attorney there.
>
> * * *
>
> Judge, the Court in *U.S. v. Davis* has said that they have refused to adopt a rule that requires an officer to ask any clarifying questions or back anything up as to whether she wants an attorney or not. It is, in fact, the defendant's responsibility to say I want an attorney, and it has to be unambiguous and unequivocal.

App. 19a-20a.

Though acknowledging that it was a "close call," the trial court granted the motion to suppress. App. 21a. The judge said that "it was obvious that this lady was thinking about I want an attorney or I need an attorney." Therefore, the judge concluded, Collins' "question should have been answered." *Id.* After reiterating the State's position that "*U.S. v. Davis* has stated that [police officers are] under no burden to answer" questions like Collins', the prosecutor asked the judge for "a clarification on what the law [was] ... that [she was] basing the ruling on." App. 21a-22a. In answering, the trial judge persisted in her focus on what she perceived to be Collins' desire for a lawyer and the officers' failure to clarify her intent: "The officers never answered her question. It was evident to this Court that the defendant was trying to get into an attorney; I might need an attorney. Something should have been said, and it wasn't." App. 23a.

2. *Alabama Court of Criminal Appeals.* With the encouragement of the trial judge (who said the case presented a question that "probably could go either way," App. 21a), the State appealed. Responding to the trial court's fixation on the invocation issue, the State noticed three issues for appeal: (1) "Whether the defendant invoked her right to counsel before the police questioned her?" (2) "Whether the police were required to answer questions

asked by the defendant concerning the amount of time she would be required to wait for an attorney?" And (3) "Whether these questions were an invocation of the defendant's right to counsel?" CR 15. Emphasizing *Davis*, the State argued to the Court of Criminal Appeals that the trial court's "finding that Collins's statement was not voluntary, because it was given after she had invoked her right to counsel, was an erroneous finding based on the court's application of a subjective standard to that matter" – *e.g.*, its statement that Collins was "thinking about" or "trying to get" a lawyer – "rather than the objective standard required by law." Br. of Appellant 1. Because "Collins made no unequivocal and unambiguous invocation of her right to counsel" as required by *Davis*, the State argued, the trial court was wrong to employ *Edwards' per se* analysis in assessing the validity of Collins' waiver. *Id.* And, the State added, a standard totality-of-the-circumstances review gave no reason to doubt the voluntariness of Collins' waiver; "[s]he was fully informed of her constitutional rights, including her right to counsel, before making the statement and executed a written waiver of those rights before making the statement." *Id.*

In a 3-2 decision, the Court of Criminal Appeals affirmed the suppression of Collins' statement. After describing the events leading up to Collins' confession, the Court of Criminal Appeals noted that the trial court had "indicated its concern that Collins 'was thinking about' getting an attorney." App. 6a. "The judge stated that the officers should have answered Collins's question and, because they did not, Collins did not knowingly and voluntarily waive he right to counsel. ... We agree." *Id.*

The Court of Criminal Appeals initially – and correctly – observed that "Collins made an ambiguous statement about counsel after the *Miranda* rights were read to her." App. 9a. The court then held that the interrogating officers "should have clarified then whether Collins wanted to contact an attorney." *Id.* But, the court explained, rather than asking

follow-up questions (or terminating the interview immediately), the officers "ignored Collins's question" and "placed the waiver form in front of her for her signature." *Id.* As had the trial court, the Court of Criminal Appeals found "that Collins's question, 'And I will have to wait til when?' regarding the length of time it would take to get an attorney implie[d] that she, perhaps, wanted to contact an attorney." App. 10a. "This question," the court said, "should have been answered, and the interrogating officer should have clarified whether Collins was asking to talk to an attorney." *Id.* The officer's failure to do so was fatal, the court held: "The officer's failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature prevents us from determining that Collins's signature on the form satisfied the State's burden of proving that she knowingly and intelligently relinquished her rights." *Id.*

Immediately after holding that because the officers had neither terminated the interview nor clarified Collins' ambiguous statement her subsequent written waiver was *per se* invalid, the Court of Criminal Appeals turned its attention to the State's argument "that *Davis v. United States*, 512 U.S. 452 (1994), mandates a reversal of the trial court's ruling." App. 10a. In *Davis*, the court below accurately summarized, this Court "held that, after a suspect waives his *Miranda* rights, questioning must cease during an interrogation only when the suspect makes an unambiguous and unequivocal invocation of the right to counsel." *Id.* Continuing, the court below acknowledged that this Court "did not in *Davis* create a requirement that officers ask clarifying questions when an ambiguous assertion of the right to counsel was made ...." *Id.* But, the Court of Criminal Appeals said, "[i]n *Davis*, the suspect made an equivocal statement regarding counsel *after* he had already waived his *Miranda* rights." App. 11a (emphasis added). Quoting at length from the decision in *Freeman v. State*, 857 A.2d 557 (Md. Ct. App. 2004) - which itself had quoted and followed *State v. Leyva*, 951 P.2d 738 (Utah 1997), and *State v. Tuttle*, 650 N.W.2d 20 (S.D. 2002) -

the court below refused to apply *Davis*' clear-invocation rule where, as here, the suspect makes an ambiguous reference to a lawyer *before* waiving his rights - for example, during or immediately following the *Miranda* warnings themselves. App. 11a-12a.

"Therefore," the Court of Criminal Appeals "h[e]ld that *Davis* does not apply to this case." App. 12a. "Collins's questions were directed to the delay involved in obtaining a lawyer, and she asked them before she signed the waiver-of-rights form." *Id.* "Because Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer," the court held that *Davis* was inapplicable and that "the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity." *Id.*

3. *Alabama Supreme Court.* The State petitioned the Alabama Supreme Court for certiorari. That court initially granted the State's petition, but subsequently quashed the writ. App. 27a.[2]

* * *

There is one additional procedural point worth making. We expect that, in an effort to dissuade this Court from considering the Question Presented, Collins will downplay *Davis* and attempt to characterize the Court of Criminal Appeals' decision as involving a run-of-the-mill totality-of-the-circumstances inquiry into the voluntariness of Collins' waiver. (Collins pursued that tack - successfully, it would seem, given the order quashing the State's petition for certiorari - in the Alabama Supreme Court.) And there is, we acknowledge, some language in the lower courts' decisions that might suggest, at first blush, that those courts were conducting something like a totality-of-the-circumstances voluntariness analysis. Ultimately, however,

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[2] Unlike this Court, which dismisses only one or two writs of certiorari per Term, the Alabama Supreme Court quashes (*i.e.*, dismisses) dozens of writs each year.

neither opinion can bear the construction that Collins has tried (and, presumably, will try again) to graft onto it. The only fair reading of the lower courts' decisions shows that both the trial court and the Court of Criminal Appeals applied a *per se* rule that tied the "voluntariness" – and thus the validity – of Collins' waiver singularly and inextricably to the officers' failure to terminate the interview or to ask clarifying questions following Collins' ambiguous statement about counsel. We explain briefly.

The trial court concluded that "[i]t was evident ... that the defendant was trying to get into an attorney; ... might need an attorney" and that "[s]omething should have been said, and it wasn't." App. 23a. *For that reason*, the trial court observed, "there's no way that this Court in good conscience watching that videotape can say that lady knowingly and voluntarily waived her right to an attorney." *Id.*; *accord id.* at 21a ("I do not think that that lady knowingly and voluntarily – *the question should have been answered.*" (emphasis added)); *id.* at 22a ("[W]hat I've got to look at is what's on that tape and the situation that was happening right there. And the defendant is the one who I've got to look at, and *she was the one who was not told.*" (emphasis added)).

The Court of Criminal Appeals was even clearer on this score. As noted above, the appellate court expressly "agree[d]" with the trial court's holding "that the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel." App. 6a (emphasis added). And, again, just before it considered *Davis* and refused to apply it in the pre-waiver setting, the Court of Criminal Appeals concluded by holding that "[t]he officer's failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature *prevents us from determining* that Collins's signature on the form satisfied the State's burden of proving that she knowingly and intelligently relinquished her rights." App. 10a. The language of the court's opinion,

standing alone, makes clear that it decided the case on the basis of a *per se* rule, not a totality-based voluntariness analysis.

But there is more. Had the Court of Criminal Appeals been convinced that Collins' waiver was involuntary in the totality-of-the-circumstances sense, there would have been no need whatsoever for it to consider *Davis'* applicability (which, of course, it did at length and in detail). The reason is this: Even where *Edwards'* prophylactic rule does not apply - for instance, because a suspect's invocation is insufficiently clear under *Davis* - the State must still demonstrate that the suspect's waiver is voluntary, knowing, and intelligent under the totality-of-the-circumstances. *Edwards*, that is, buys the suspect an extra layer of protection, over and above the baseline voluntariness requirement. If a suspect "invokes" his right to counsel - thus triggering *Edwards* - any subsequent waiver or statement that is the product of police-initiated questioning is *per se* invalid, without regard to actual, real-world voluntariness. If, by contrast, *Edwards' per se* rule is not in play (because there has been no affirmative invocation), the waiver analysis reverts to the normal rule - that the State bears the burden of showing, under the totality of the circumstances, that the waiver is voluntary, knowing, and intelligent.[3] If the Court of Criminal Appeals had thought that this case turned on a garden-variety voluntariness inquiry, it surely would have excused itself from deciding *Davis'* applicability, knowing full well that even if it found *Davis* applicable (and thus *Edwards' per se* rule inapplicable), a totality-based voluntariness assessment would remain. That the court went ahead and resolved the *Davis* question demonstrates that the *Davis* question - and not a free-floating voluntariness analysis - drove its decision.

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[3] For a fuller explanation of the interplay between *Edwards' per se* rule and the traditional totality-based voluntariness inquiry, see *infra* at 27-28.

Clearly, the state courts here were *not* conducting an ordinary totality-of-the-circumstances inquiry into the voluntariness of Collins' waiver. Rather, both courts applied a *per se* rule: Because the police did not respond to Collins' "ambiguous statement about counsel" (App. 9a) by asking clarifying questions (or terminating the interview immediately), Collins' subsequent written waiver was invalid.

REASONS FOR GRANTING THE WRIT

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court held (1) that once a suspect "invokes" his right to have counsel present during custodial interrogation police must immediately cease questioning and (2) that, thereafter, any subsequent statement or *Miranda* waiver that is the product of police-initiated questioning is *per se* invalid. The question then arose: What must a suspect do to "invoke" his right to counsel and trigger *Edwards'* prophylactic rule? In both *Smith v. Illinois*, 469 U.S. 91, 96 n.3 (1984), and *Connecticut v. Barrett*, 479 U.S. 523, 529-30 n.3 (1987), this Court noted – but found it unnecessary to clarify – the divergent approaches that courts around the country had adopted to deal with suspects' ambiguous or equivocal references to counsel during *Miranda* colloquies or ensuing interrogations.

Later, in *Davis v. United States*, 512 U.S. 452 (1994), this Court clearly answered *part* of the question it had tabled in *Smith* and *Barrett*: It held that "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until the suspect clearly requests an attorney." *Id.* at 461. *Davis*, in turn, has spawned a new split of authority. The question now – which this case squarely implicates – is whether the clear-invocation rule that *Davis* announced applies, as well, to a statement about counsel made during the initial *Miranda* colloquy and *before* a waiver.

Certiorari is appropriate here for four reasons, which we will explain in turn. First, the split among the lower courts is deep and entrenched and, moreover, results from a disagreement about how best to understand and apply one of this Court's own decisions. Second, the issue – which bears on the parameters of permissible police questioning – is one that carries tremendous practical implications for law enforcement officers and criminal suspects alike. Third, the decision below is wrongly decided; it is unfaithful to the sensible policy that animates this Court's *Davis* decision. Finally, this case, whose entire factual record comprises one short videotaped confession and one 10-page suppression-hearing transcript, provides an excellent vehicle for addressing the Question Presented. This Court should step in now to set matters straight.

I. There Is a Clear and Established Split of Authority Concerning Whether *Davis*' Clear-Invocation Rule Applies to Statements Made During the Initial *Miranda* Colloquy.

In the words of one commentator, "[t]he question remains after *Davis*: does the *Davis* rationale apply to an initial ambiguous response (*e.g.*, sequence is a warning, followed by an ambiguous response)?" Harvey Gee, *Essay: When Do You Have To Be Clear?: Reconsidering* Davis v. United States, 30 S.W. U. L. Rev. 381, 384 (2001). That question, as he correctly points out – and as we will explain – "has confused and confounded the state officials and lower-court judges who labor with the decision at the ground level." *Id.* at 382.

Indeed, it is indisputable that there is a clear split of authority concerning *Davis*' application to "ambiguous statement[s] about counsel" (App. 9a) made during the initial *Miranda* colloquy. There are several features of the split worth mentioning here; they combine to make the issue particularly worthy of this Court's consideration.

A. The Question Presented Here Actually Pre-Dates This Court's Decision in *Davis*.

In setting up its discussion in *Davis*, this Court observed that it had "twice previously noted the varying approaches the lower courts ha[d] adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation[s]." 512 U.S. at 456. Specifically, the *Davis* Court pointed to *Smith v. Illinois*, 469 U.S. 91, and *Connecticut v. Barrett*, 479 U.S. 523, both of which had acknowledged – but ultimately found no need to resolve – the lower courts' disagreement.

As we have already noted, in *Davis*, this Court resolved the disagreement *in part* by holding that at least "*after a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." 512 U.S. at 461 (emphasis added). And as we will explain in detail below, in the wake of *Davis*, the lower courts have divided sharply over whether *Davis*' clear-invocation rule should apply pre-waiver, as well. But before describing the split, we want to make one prefatory point – specifically, that while the current state of lower-court disagreement has crystallized in the years since *Davis*, it actually traces its roots to the pre-*Davis* era. Indeed, *Smith* itself involved a statement about counsel uttered not during interrogation (*i.e.*, post-waiver) but, rather, during the initial *Miranda* colloquy. *See* 469 U.S. at 92-93 (reciting colloquy and remark). It was in *that* (*i.e.*, pre-waiver) context that this Court first noted that "courts have developed conflicting standards for determining the consequences" of "ambiguous or equivocal" requests for counsel and, specifically, whether such a request triggers *Edwards*' *per se* rule. *Id.* at 95. The *Smith* Court, again, found no need to resolve the disagreement in that case. The point is simply that, even then – a decade before *Davis* – courts were split over how to

treat suspects' pre-waiver ambiguous statements about counsel.[4]

B. In the Years Since *Davis*, the Lower Courts Have Divided Sharply Concerning *Davis'* Application to Ambiguous Pre-Waiver Statements About Counsel.

The question presented here is something of a toggle: Either *Davis'* clear-invocation rule applies pre-waiver or it does not. In other words, when faced with an "ambiguous statement about counsel" (App. 9a) made during the initial *Miranda* colloquy, police are either required to terminate the interview immediately (or to clarify the request) or they are not. Courts have lined up on both sides of the issue.

1. At Least Six Lower Courts Have Held That *Davis'* Clear-Invocation Rule Does Not Apply Pre-Waiver.

Courts in Alabama (in the decision below), Alaska, Maine, Maryland, South Dakota, and Utah have all held that *Davis'* clear-invocation rule does *not* apply pre-waiver, and that when a suspect makes even an ambiguous statement about counsel during the initial *Miranda* colloquy, the police must either (1) terminate the interview immediately or (2) pose follow-up questions aimed solely at clarifying the request.

In the decision below, the Alabama Court of Criminal Appeals acknowledged that in *Davis* this Court "held that, after a suspect waives his *Miranda* rights, questioning must cease during an interrogation only when the suspect makes an unambiguous and unequivocal invocation of the right to counsel" and, further, that this Court there had refused to "create a requirement that officers ask clarifying questions when an ambiguous assertion of the right to counsel was

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[4] So, too, in *Barrett* – cited alongside *Smith* at the outset in *Davis* – this Court acknowledged but reserved the question of how to treat a suspect's "ambiguous or equivocal *response to the* Miranda *warnings* ...." 479 U.S. at 529 n.3 (emphasis added).

made ...." App. 10a. But, the Court of Criminal Appeals emphasized, in *Davis* the suspect made the ambiguous statement regarding counsel only "after he had already waived his *Miranda* rights." App. 11a. And while it "ha[d] not specifically considered whether *Davis* applies to pre-waiver situations," the Court of Criminal Appeals observed that "other appellate courts have considered this issue." *Id.*

For its part, the Court of Criminal Appeals "adopt[ed]" the "analysis and decision of the issue as discussed" in *Freeman v. State*, 857 A.2d 557 (Md. Ct. App. 2004) - which had itself adopted the analyses of the courts in *State v. Leyva*, 951 P.2d 738 (Utah 1997), and *State v. Tuttle*, 650 N.W.2d 20 (S.D. 2002). Specifically, the court below "h[e]ld that *Davis* does not apply to this case" because Collins made her remark concerning a lawyer "before she signed the waiver-of-rights form." App. 12a. Continuing, the court below held that "[b]ecause Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity." *Id.* Reiterating, the court concluded that in the light of Collins' remark, "there remained an ambiguity regarding whether [she] wanted to talk to an attorney" and that, despite *Davis*, "the officer had a duty to clarify" her wishes. App. 13a.

At least five other courts have held that *Davis*' clear-invocation rule applies only after a suspect has already validly waived his *Miranda* rights, and does not apply in the pre-waiver setting.

a. ***Utah.*** In *State v. Leyva*, the Supreme Court of Utah considered the State's argument that under *Davis* "law enforcement officers are no longer required to clarify a suspect's ambiguous or equivocal reference to *Miranda* rights in either a pre- or post-waiver scenario." 951 P.2d 738, 743 (Utah 1997). Expressly rejecting that argument, the Utah court held that the State had read *Davis* "too broadly" and that, in fact, it was "clear" that *Davis* "applied only to a suspect's attempt to reinvoke his *Miranda* rights '*after* a

knowing a voluntary waiver' of the same." *Id.* (quoting *Davis*, 512 U.S. at 461 (emphasis added in *Leyva*)). "Plainly," the Utah court said, "the Court in *Davis* did not intend its holding to extend to prewaiver scenarios, and we see no reason to so extend it." *Id.* Thus, the court concluded, "[i]f the suspect responds ambiguously or equivocally" during the *Miranda* colloquy, "the officer must then focus on clarifying the suspect's intent." *Id.* at 744. *Accord State v. Galli*, 967 P.2d 930, 935 n.4 (Utah 1998) (reaffirming *Leyva*'s limitation of *Davis* to post-waiver setting).

b. ***Maine.*** In *State v. Holloway*, 760 A.2d 223 (Me. 2000), the Supreme Judicial Court of Maine likewise held that *Davis'* clear-invocation rule applies only post-waiver. The court there noted that the State had "cite[d] cases" – most prominently, *Davis* – "involving attempts to invoke the right to remain silent and the right to an attorney subsequent to a valid *waiver* of those rights following a proper *Miranda* warning for the proposition that police need not honor an ambiguous invocation even in the absence of a prior valid waiver of the right." *Id.* at 228 (emphasis in original). The Maine court expressly "decline[d] the State's implicit invitation to extend the holding[] in *Davis* ... to require an unambiguous *invocation* of the right to remain silent and the right to an attorney in the absence of a prior waiver." *Id.* (emphasis in original). *Accord State v. Lockhart*, 830 A.2d 433, 443 (Me. 2003) ("When an individual has not yet made a valid waiver of the *Miranda* rights and invokes, even ambiguously, the right to remain silent or the right to an attorney, he or she has invoked the *Miranda* rights.").

c. ***South Dakota.*** In *State v. Tuttle*, the Supreme Court of South Dakota held that *Davis'* clear-invocation rule "obviously" applies only "to instances where suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights." 650 N.W.2d 20, 28 (S.D. 2002). "[I]n sum," the court reiterated, *Davis* "applies to an equivocal postwaiver invocation of rights." *Id.* Quoting with approval the Supreme Court of Utah's decision in

Leyva, the South Dakota court "f[ound] persuasive the *Leyva* Court's distinction between an equivocal response to an initial *Miranda* advisement and an equivocal postwaiver invocation." *Id.* "Accordingly," the South Dakota court held, "when an officer receives an equivocal response to the reading of the *Miranda* rights, the officer must limit questioning to clarifying the suspect's response." *Id.*

d. ***Maryland.*** In *Freeman v. State*, the Maryland Court of Special Appeals announced that it, too, was "persuaded by the reasoning" of the Supreme Court of Utah's decision in *Leyva*, "which distinguishes between an ambiguous response to an initial *Miranda* advisement and an equivocal post-waiver invocation." 857 A.2d 557, 572 (Md. Ct. App. 2004). Following Utah's (and South Dakota's) lead, the Maryland court held that "an officer faced with an ambiguous response to an initial advisement of *Miranda* rights, *i.e.*, at the pre-waiver stage, is limited to posing questions designed to clarify the suspect's ambiguous response." *Id.* at 572-73 (citing *Leyva*, 951 P.2d at 745, and *Tuttle*, 650 N.W.2d at 28). The Maryland court observed that *Davis*' clear-invocation rule applies only "to a situation in which the defendant had previously waived his right [to counsel] and then, during the interrogation, arguably sought to exercise his rights," and it expressly "decline[d] to apply the rationale of *Davis*" in the pre-waiver setting. *Id.* at 573.

e. ***Alaska.*** In *Noyakuk v. State*, the Alaska Court of Appeals likewise expressly held that "the *Davis* rule (that interrogating officers need not interrupt their questioning to clarify the suspect's wishes) applies only to a post-*Miranda*-waiver setting." 127 P.3d 856, 869 (Alaska Ct. App. 2006) Citing *Leyva*, the Alaska court emphasized that "*Davis* involved an ambiguous or equivocal statement made in the middle of an interview by a suspect who had *already* received Miranda warnings and had *already* unambiguously waived his right to counsel." *Id.* (emphasis in original). Where, by contrast, the ambiguity arises pre-waiver, the court held, "the interrogating officers must clarify the

suspect's wishes, and the officers cannot proceed with substantive questioning until they have done so." *Id.* at 868.

2. More Than a Dozen Lower Courts Have Held That *Davis'* Clear-Invocation Rule Does Apply Pre-Waiver.

The Seventh and Tenth Circuits, as well as the state courts in Arkansas, California, the District of Columbia, Georgia, Illinois, Kansas, Michigan, Montana, Nevada, Oklahoma, and Wyoming, have expressly held that *Davis'* clear-invocation rule applies to ambiguous statements about counsel made during initial *Miranda* colloquies – *i.e.*, in the pre-waiver setting. The Illinois Supreme Court's recent decision in *In re Christopher K.*, 841 N.E.2d 945 (Ill. 2005), is illustrative. The court there acknowledged "that the holding in *Davis* is limited to the situation where the alleged invocation of the right to counsel comes after a knowing and voluntary waiver of the suspect's *Miranda* rights" and noted the defendant's related "implication" that the Supreme Court "has left open the issue of whether [*Davis'*] objective test applies in a prewaiver setting." *Id.* at 964. But the Illinois court held that *Davis'* clear-invocation rule should apply, as well, "to situations where, as here, the suspect makes a reference to counsel immediately after he has been advised of his *Miranda* rights." *Id.* at 964-65. "In such a case," the court held, "the relevant inquiry should remain" – as in *Davis* – "whether a reasonable officer in the circumstances would have understood only that the suspect might be invoking the right to counsel, or stated alternatively, whether the suspect's articulation of the desire to have counsel present was sufficiently clear that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney." *Id.* at 965 (citing *Davis*, 512 U.S. at 459).

Thus, "[t]he fact that waiver has not yet occurred" does not preclude *Davis'* application; rather, that fact "can simply be subsumed into [*Davis'*] objective test." *Id.* In other words, although "[t]he primary focus of the inquiry ...

should remain on the nature of the actual statement at issue," "a trial court may consider the proximity between the *Miranda* warning and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement." *Id.*

A number of other courts have specifically applied *Davis'* clear-invocation rule to ambiguous pre-waiver statements about counsel. Because they are numerous, we catalogue those decisions only briefly:

- ***Seventh Circuit***: *United States v. Muhammad*, 120 F.3d 688, 697-98 (7th Cir. 1997) (applying *Davis* to find invocation insufficient where, in response to *Miranda* advisement concerning counsel and before subsequent waiver, suspect simply said "an attorney"); *accord United States v. Walker*, 272 F.3d 407, 413 (7th Cir. 2001) (reaffirming *Muhammad* and applying *Davis* pre-waiver).

- ***Tenth Circuit***: *United States v. Brown*, 287 F.3d 965, 970-73 (10th Cir. 2002) (applying *Davis* to find invocation insufficient where, in response to *Miranda* advisement concerning counsel and before subsequent waiver, suspect answered "yes" both to the question, "[D]o you wish to answer questions now without a lawyer present?" and to the question, "Do you want to talk to a lawyer?").

- ***Arkansas***: *Moore v. State*, 903 S.W.2d 154, 156-58 (Ark. 1995) (applying *Davis* to find invocation insufficient to trigger *Edwards* where suspect made ambiguous statement about counsel "before [the officer] completed the administration of [the suspect's] constitutional rights which he subsequently waived").

- ***California***: *People v. Crittenden*, 885 P.2d 887, 908-13 (Cal. 1995) (applying *Davis* to find invocation insufficient where suspect interrupted initial *Miranda* advisement with question – "Did you say I could have a lawyer?" – and only later waived his rights).

- ***District of Columbia***: *Gresham v. United States*, 654 A.2d 871, 873-74 (D.C. 1995) (applying *Davis* to find invocation insufficient where suspect made ambiguous statement about counsel "before the police questioned him or administered the *Miranda* warnings" and only later waived his rights).

- ***Georgia***: *Smith v. State*, 499 S.E.2d 663, 681-82 (Ga. Ct. App. 1998) (applying *Davis* to find invocation sufficient where, immediately after *Miranda* advisement but before subsequent waiver, suspect asked, "[S]o if I want an attorney right now, what do I do?").

- ***Kansas***: *State v. Ninci*, 936 P.2d 1364, 1380-82 (Kan. 1997) (applying *Davis* to find invocation insufficient where, immediately after *Miranda* advisement but before waiver, suspect asked, "[D]o I need to have a lawyer right now?"); *accord State v. Morris*, 880 P.2d 1244, 967, 972-75 (Kan. 1994) (applying *Davis* to find pre-waiver invocation insufficient); *State v. Jackson*, 19 P.3d 121, 124-25 (Kan. 2001) (same); *State v. Caenen*, 19 P.3d 142, 149-50 (Kan. 2001) (same).

- ***Michigan***: *People v. Granderson*, 538 N.W.2d 471, 473-74 (Mich. Ct. App. 1995) (applying *Davis* to find invocation insufficient where, in response to *Miranda* advisement concerning counsel and before subsequent waiver, suspect said "Yeah,

I'm – I'm ah need that 'cause I can't afford none").

- ***Montana***: *State v. Simmons*, 15 P.3d 408, 409, 412 (Mont. 2000) (applying *Davis* to find invocation insufficient where suspect made ambiguous statement about counsel in response to initial *Miranda* advisement).

- ***Nevada***: *Kaczmarek v. State*, 91 P.3d 16, 23-24, 27-28 (Nev. 2004) (applying *Davis* to find invocation insufficient where, immediately after initial *Miranda* advisement but before subsequent waiver, suspect "said his attorney was coming this afternoon and wondered if [police] could talk to him then").

- ***Oklahoma***: *Stemple v. State*, 994 P.2d 61, 69 (Okla. Crim. App. 2000) (applying *Davis* to find invocation insufficient where, before administration of *Miranda* warning, suspect said "I feel as though I should have an attorney ... because how ugly this looks on me").

- ***Wyoming***: *Monroe v. State*, 126 P.3d 97, 98-103 (Wyo. 2006) (applying *Davis* to find invocation insufficient where, immediately after *Miranda* advisement but before subsequent waiver, suspect asked, "Are you going to get me a good attorney?").

The premise underlying these numerous decisions applying *Davis* to pre-waiver statements is that this Court's "holding in *Davis* focused on the clarity of the request for counsel, not on its timing." *Harte v. State*, 13 P.3d 420, 429 (Nev. 2000).

C. The Split Among the Lower Courts Results Directly From Divergent Interpretations of this Court's Own Opinion in *Davis*.

The split among the lower courts, as demonstrated above, is both clear and entrenched. Also significant is the fact that the lower courts' disagreement is the direct result of those courts' divergent interpretations of one of this Court's own decisions. On the one hand, courts in "post-waiver-only" camp have focused narrowly on the holding of *Davis* to conclude that the clear-invocation rule articulated in that case "clear[ly]" and "obviously" applies only after a suspect has validly waived his rights. *See Leyva*, 951 P.2d at 743; *Tuttle*, 650 N.W.2d at 28. And, although we ultimately disagree with the post-waiver-only reading, there is, we must admit, some language in *Davis* that could be understood to support it. The holding, as we have said, only addresses the post-waiver scenario: "We therefore hold that, *after a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." 512 U.S. at 461 (emphasis added). In the same vein, the Court in *Davis* noted that "[a] suspect *who knowingly and voluntarily waives his right to counsel after having that right explained to him* has indicated his willingness to deal with the police unassisted." *Id.* at 460-61 (emphasis added).

On the flip side, there is plenty in *Davis* to support the broader reading embraced by courts that have extended the clear-invocation rule to the pre-waiver setting. As an initial matter, in the penultimate paragraph of the opinion, the *Davis* Court noted *Edwards'* holding that "if the suspect invokes the right to counsel *at any time*, the police must immediately cease questioning him until an attorney is present" and explained that it was "unwilling to create a third layer of prophylaxis to *prevent* police questioning in when the suspect *might* want a lawyer." *Id.* at 462 (emphasis added). Both statements seem to contemplate a forward-

looking application that attaches with the initial *Miranda* advisement and continues throughout the interrogation.

Even more significant is the *Davis* Court's consistent emphasis on the need for clarity. The principal policies animating *Davis'* adoption of a clear-invocation rule are, as the opinion itself makes clear, "avoid[ing] difficulties of proof" and "provid[ing] guidance to officers conducting interrogations." *Id.* at 448-59. After all, this Court emphasized, "it is police officers who must actually decide whether or not they can question a suspect." *Id.* at 461. The Court noted that "[t]he *Edwards* rule – questioning must cease if the suspect asks for a lawyer – provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Id.* But, the Court warned, "if [it] were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost." *Id.* "Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.*

The clarity that this Court emphasized in *Davis* is certainly no less important to investigating officers before a waiver than after. In either case, the officers need to know whether they can question the suspect or not, and there is no reason to think that police are better at reading suspects' minds during or immediately following the *Miranda* colloquy than during the subsequent interrogation. Not surprisingly, therefore, a number of the courts applying *Davis* in the pre-waiver setting have stressed the opinion's need-for-clarity language. *See, e.g., Monroe*, 126 P.3d at 101; *Jackson*, 19 P.3d at 125; *Stemple*, 994 P.2d at 69; *Gresham*, 654 A.2d at 874; *Morris*, 880 P.2d at 1252-53.

The point, for present purposes, is that some courts have found that *Davis* clearly points in one direction, while many

others believe that it points – just as clearly – in precisely the opposite direction.

II. The Practical Implications of the Question Presented and the Split That It Implicates Are Very Real.

The Question Presented here, while "an intellectually interesting and solid problem," is hardly "academic or ... episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Quite the contrary, the issue at the core of this case – When is it appropriate to question a criminal suspect? – arises on a more-than-daily basis in police bureaus and station-houses throughout the country. When, during the recitation of *Miranda* warnings, a suspect makes an "ambiguous statement about counsel" (App. 9a), must the police immediately terminate the interview? May they ask follow-up questions in an effort to clarify the suspect's intentions? *Must* they ask follow-up questions? Or, as was decided in *Davis*, may they continue with substantive questioning until the suspect says something definitive? These questions are the daily grist of police-suspect interactions. They profoundly affect the real-world lives of individuals in a way that few other questions brought before the Court could.

The State, of course, is particularly concerned for the plight of police officers operating in the hurly-burly of crime fighting and investigation, who, as we explain in detail below, need clear rules by which to order their conduct. But the desire for clarity is not the police's alone; as this Court has emphasized in a somewhat related context, "[n]either the police nor criminal defendants ... benefit from" lingering uncertainty about the ground rules for custodial interrogations. *Berkemer v. McCarty*, 468 U.S. 420, 432 (1984).

There is another important practical point worth making here. As travel becomes easier and the world gets smaller, crime-fighting is increasingly a multi-jurisdictional enterprise. Police in one State routinely arrest and –

critically here – interrogate suspects sought for crimes committed in other States. Thus, for instance, an officer in Georgia could very well pick up a suspect in an Alabama murder investigation, interrogate him pursuant to the understanding of *Davis* prevailing in Georgia (which requires an unambiguous invocation, even pre-waiver, to trigger *Edwards'* prophylactic rule, *see supra* at 20), and obtain a full confession – only to turn him over to Alabama authorities and learn that Alabama courts will suppress the confession based on their reading of *Davis* (which requires either termination of questioning or clarification in response to any pre-waiver statement about, however ambiguous, *see supra* at 14-15). On the flip side, an Alabama officer may pick up a Georgia suspect and question him briefly, only to terminate the interview at the first vague reference to an attorney, thereby short-circuiting what, on the Georgia courts' reading of *Davis*, would have been a perfectly valid interrogation. Similar scenarios could (and surely will) trip up officers in other multistate investigations. Cross-border efforts between the District of Columbia and Maryland, Montana and South Dakota, Wyoming and South Dakota, Wyoming and Utah, and Nevada and Utah are of course particularly vulnerable – although the possibilities for the sorts of snafus we have described are far more numerous.

The point is that not only is the disagreement among the lower courts clear and consistent, its real-world effects are increasingly intolerable.

III. The Decision Below Is Erroneous.

This Court should grant certiorari not only to resolve the split among the lower courts and to bring certainty to an important area of the law, but also to correct the Alabama Court of Criminal Appeals' erroneous decision. The decision below, again, holds (1) that *Davis'* clear-invocation rule does not apply to "ambiguous statements about counsel" (App. 9a) made during the *Miranda* colloquy, (2) that, therefore, the officers questioning Collins were obligated either to terminate the interview or to clarify her

remark, and (3) that because they failed to do so Collins' subsequent written waiver was *per se* invalid. *See supra* at 6-11. That decision, while not foreclosed by *Davis'* holding – which, as we have noted, concerns the post-waiver setting only – cannot be squared with *Davis'* sensible rationale. We will explain briefly.

Time and again, this Court has emphasized that because they must make split-second decisions, police officers need clear rules to guide their actions. *See, e.g., Thornton v. United States*, 541 U.S. 615, 622-23 (2004) (stressing the "need for a clear rule, readily understood by police officers"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (rules governing police conduct must be "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing"); *New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and not "'qualified by all sorts of ifs, ands, and buts'").

And, indeed, as noted above, "guidance to officers conducting investigations," "clarity," and "ease of application" were the policies chiefly driving the *Davis* decision itself. 512 U.S. at 461. The whole point there was to articulate and maintain "a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Id.* Thus, this Court settled on a clear-invocation requirement, which, it emphasized, would relieve police officers of the need to "make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.* Ambiguities can and do arise during the initial *Miranda* colloquy just as surely as during substantive questioning. Investigators are no better, as we have said, at reading suspects' minds before a waiver than after. And the consequence of "guess[ing] wrong," as this Court put it in

Davis – suppression of often vital information – is the same in both settings. Accordingly, from the law-enforcement perspective, the imperative for clarity is no less real in this case than in *Davis*.

It is no answer to say, as the courts in the post-waiver-only camp do, that because the State bears "a heavy burden" to demonstrate that a suspect has waived his rights voluntarily, knowingly, and intelligently, *see Miranda v. Arizona*, 384 U.S. 436, 475 (1966), the suspect cannot be asked to invoke his right to counsel unambiguously in the pre-waiver setting. *See, e.g., Leyva*, 951 P.2d at 743 (quoting *Miranda*'s "heavy burden" language in refusing to apply *Davis* pre-waiver); *Tuttle*, 650 N.W.2d at 28 (same); *Freeman*, 857 A.2d at 570-71 (same); *see also* App. 11a ("agree[ing] with" and "adopt[ing]" those courts' analyses). That position, with respect, mixes apples and oranges. Of course the State bears the burden of demonstrating that the suspect's waiver is valid, and nothing in our position here suggests otherwise. But there is a critical difference between the waiver rules that apply (1) where a suspect is read his rights and then (without specifically invoking his right to counsel) waives or talks, and (2) where a suspect actually invokes his right to counsel within the meaning of *Edwards*.

In the first instance, where a suspect is Mirandized and then waives – either expressly or, perhaps, just by talking to police, *see North Carolina v. Butler*, 441 U.S. 369, 373-76 (1979) – the question is whether the waiver (or confession, as the case may be) was voluntary, knowing, and intelligent in the *Johnson v. Zerbst*, 304 U.S. 458 (1938), sense. *See Miranda*, 384 U.S. at 475. Where, by contrast, a suspect actually "invokes" his right to counsel, he obtains the added benefit of *Edwards*' "second layer of prophylaxis." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). That second layer of prophylaxis is, this Court has explained, a heightened, *per se* waiver rule that if, after invocation, the police "subsequently initiate an encounter in the absence of counsel ... the suspect's statements are presumed involuntary and therefore

inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *Id.* at 177; *accord Minnick v. Mississippi*, 498 U.S. 146, 159-60 (1990) (Scalia, J., dissenting) (explaining that *Edwards* operates as "*higher* standard for the waiver of *Miranda* rights" and renders "*per se* involuntary" any waiver that is the product of post-invocation police-initiated interrogation).

The point is that where *Edwards*' extra protection – its "second layer of prophylaxis" – is triggered by a suspect's invocation, the waiver analysis shifts dramatically from one that requires the State to demonstrate validity under *Zerbst* to one that conclusively presumes the waiver invalid (no matter how voluntary, knowing, and intelligent in the *Zerbst* sense). Thus, the fact that the State bears the burden in the normal course of proving a waiver's validity *has nothing at all to do* with whether a suspect should be required to speak clearly in order to obtain the benefit of the heightened, *per se* waiver rule that applies under *Edwards*.

IV. This Case Provides an Excellent Vehicle for Addressing the Question Presented.

Several considerations combine to make this case an excellent vehicle for this Court's consideration of the Question Presented. First, the record in this case is both quite small and quite clear. All facts pertinent to the case are undisputed, and are contained in a single 10-page suppression-hearing transcript and a single brief videotape of Collins' confession. As the court below noted: "The only evidence presented to the trial court was the videotape of Collins's statement to the police; the videotape presents no conflicting evidence." App. 3a. Accordingly, "[t]he facts in this case are undisputed," and the courts below "made only legal findings, applying the law to these undisputed facts." *Id.*

Second, as we have explained in detail above (*see supra* at 8-11), a fair reading of the lower courts' opinions

demonstrates that those courts applied a *per se* rule invalidating Collins' written waiver on the ground that (1) she made an "ambiguous statement about counsel" (App. 9a) and (2) in response to that ambiguous statement, the police neither immediately terminated the interview nor followed up with clarifying questions. As the Court of Criminal Appeals itself summarized: "The [trial] judge stated that the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel. We agree." App. 6a (emphasis added). Explaining, the appellate court found "that Collins's question, 'And I will have to wait til when?' regarding the length of time it would take to get an attorney implies that she, perhaps wanted to contact an attorney." App. 10a. In the light of the ambiguity, the court held that "[t]his question should have been answered, and the interrogating officer should have clarified whether Collins was asking to talk to a lawyer." *Id.* Then, critically: "The officer's failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature *prevents us from determining* that Collins's signature on the form satisfied the State's burden of proving that she knowingly and intelligently relinquished her rights." *Id.* (emphasis added). And finally, after expressly refusing to apply *Davis* in the pre-waiver setting: "Because Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity." App. 12a.

The point is simply this: Despite loose language in the court of appeals' opinion concerning "voluntariness," it is plain that the court was not engaging in anything like a traditional *Zerbst*-like voluntariness analysis. Rather, the court seized on a single fact – that after "Collins made an ambiguous statement about counsel" (App. 9a), the investigators neither terminated the interview nor asked clarifying questions – to hold that Collins' subsequent written waiver was *per se* invalid in the *Edwards* sense.

By requiring, as a *per se* matter, that police officers either (1) terminate the interview immediately or (2) ask clarifying questions following an ambiguous statement about counsel, the court below imposed precisely the sort of "third layer of prophylaxis" that this Court expressly rejected in *Davis*. 512 U.S. at 462.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Court of Criminal Appeals of Alabama.
STATE of Alabama
v.
Cassandra Marie COLLINS.
CR-03-0466.

Jan. 28, 2005.

Troy King, atty. gen., and Andy Scott Poole, asst. atty. gen., for appellant.
Mary A. Goldthwaite, Montgomery, for appellee.

COBB, Judge.

The State of Alabama has filed this appeal pursuant to 15.7(a), Ala. R.Crim. P., seeking reversal of the circuit court's order suppressing Cassandra Marie Collins's confession. We affirm.

On August 9, 2002, a Montgomery County grand jury indicted Collins for manslaughter and other charges related to her alleged involvement in a fatal hit-and-run accident on the night of July 21, 2001. On July 26, 2001, Collins gave a videotaped statement to officers of the Montgomery Police Department. In that statement, Collins admitted that, in the early morning hours of July 21, she was driving and "wasn't paying any attention to the road at all," and was turned around and looking for something in her purse, which was on the backseat of the vehicle. (Supp. R. 18.) While she was turned around, Collins said, she hit something and her car swerved. When she looked up, she noticed that her windshield was broken. (Supp. R. 18.) She turned and drove back to the area to see what she had hit. She saw a girl lying on the ground beside the road, and she saw that a man and a woman had stopped their cars at the

side of the road. (Supp. R. 19.) Collins said she realized that she must have hit the girl, but she "freaked out" and simply returned to her job at Baptist Hospital. She did not contact the police, even though she saw on the news the following day that the girl had been killed. (Supp. R. 21-22.)

On September 2, 2003, Collins filed a motion to suppress the videotaped statement, which she gave without counsel's presence. She alleged that she did not understand the right to counsel that had been read to her as part of the *Miranda* rights, and that, therefore, she had not voluntarily waived those rights. Specifically, Collins alleged that the police concealed vital information from her. She also argued that her waiver of the right to counsel was not knowing and voluntary and that she actually did invoke her right to counsel before she gave the statement. (C. 6-7.) At the hearing on the motion to suppress, defense counsel argued that Collins "did not know what her rights were...." (R. 2.) The trial judge noted that, after the *Miranda* rights were read to Collins, she asked how long it would take to get an attorney, and neither officer answered the question. The prosecutor argued that the videotape demonstrated that the *Miranda* rights were read to Collins and that she signed the form indicating that she understood those rights and that she was waiving them. The judge acknowledged that the issue was "a close call," but stated that Collins's question regarding how long she would have to wait for an attorney should have been answered. The judge stated that "it was obvious that this lady was thinking about" whether she needed or wanted an attorney. (R. 7.) The judge granted the motion to suppress. She explained that her ruling was based on her viewing the videotaped statement and her determination, from the defendant's question about how long it would take to get an attorney, "that the defendant was trying to get into [sic] an attorney; [']I might need an attorney.[']" (R. 10.) The judge determined that Collins had not knowingly or voluntarily waived her right to an attorney. (R. 10-11.) We agree and we affirm.

The only evidence presented to the trial court was the videotape of Collins's statement to the police; the videotape presents no conflicting evidence. The facts in this case are undisputed, and the trial court made only legal findings, applying the law to these undisputed facts. Therefore, we apply a de novo standard of review. *State v. Hill,* 690 So. 2d 1201, 1203-04 (Ala. 1996); *State v. White,* 854 So.2d 636, 638 (Ala. Crim. App. 2003); *State v. Thomas,* 843 So. 2d 834, 838-39 (Ala. Crim. App. 2002); *State v. Smith,* 785 So. 2d 1169, 1173 (Ala. Crim. App. 2000).

In *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court set forth the procedural safeguards required during a custodial interrogation. The Court stated, in part:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning."

Miranda, 384 U.S. at 444-45, 86 S. Ct. 1602, 384 U.S. 436 (1966).

The State has the burden of establishing the admissibility of a defendant's out-of-court statement. This Court has stated:

> "The general rule is that a confession or other

> inculpatory statement is prima facie involuntary and inadmissible and the burden is on the State to prove by a preponderance of the evidence that such a confession or statement is voluntary and admissible. See, e.g., *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998). To prove voluntariness, the State must establish that the defendant 'made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him.' *Lewis v. State*, 535 So. 2d 228, 235 (Ala. Crim. App. 1988). If the confession or inculpatory statement is the result of custodial interrogation, the State must also prove that the defendant was properly advised of, and that he voluntarily waived, his *Miranda* rights. See *Ex parte Johnson*, 620 So. 2d 709 (Ala. 1993), and *Waldrop v. State*, 859 So. 2d 1138 (Ala. Crim. App. 2000), aff'd, 859 So. 2d 1181 (Ala. 2002)."

Eggers v. State, [Ms. CR-02-0170, Oct. 1, 2004] --- So.2d ----, ---- (Ala.Crim.App.2004).

The Supreme Court has discussed how a court can determine whether a waiver of *Miranda* rights was voluntary:

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

> Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725[, 99 S. Ct. 2560, 61 L. Ed. 2d 197] (1979). See also *North Carolina v. Butler*, 441 U.S. 369, 374-375[, 99 S. Ct. 1755, 60 L. Ed. 2d 286] (1979)."

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

With these principles in mind, we turn to the evidence presented via the videotaped statement. The videotape indicates that Collins was in an office with two police officers. One officer read the *Miranda* rights to Collins. The officer stated during the initial portion of the videotape that he had read Collins her rights earlier that day. (Supp. R. 14.) After the officer read those rights to Collins, she said, "Okay, let me ask you a question[. It] says that I have, I can have a lawyer[.] I will have to wait to get one." The officer answered, "And that's correct." Collins asked, "And I will have to wait til when?" The officer did not respond. (Supp. R. 15.) Instead, the officer looked away from Collins and cast his eyes downward, onto the waiver-of-rights form, which he appeared to fill out while Collins waited for an answer to her question. After approximately 10 seconds passed, the officer placed the waiver-of-rights form in front of Collins and asked her to read the paragraph on the form. Collins read, "I fully understand the foregoing statement and do willingly agree to answer questions. I understand and know what I am doing. No promise or threats have been made to me by anyone and no pressure of any kind has been made against me by anyone." (Supp. R. 15.) The officer asked Collins if she understood the rights. She did not answer orally, but she signed the waiver-of-rights form. (Supp. R. 12.) She then answered all of the officer's questions about the

accident.

At the suppression hearing, the trial judge stated that she was concerned because Collins's question about the length of time it would take for her to get an attorney was never answered. (R. 3.) The court also indicated its concern that Collins "was thinking about" getting an attorney. (R. 7.) The judge stated that the officers should have answered Collins's question and, because they did not, Collins did not knowingly and voluntarily waive her right to counsel. (R. 8.) We agree.

We have previously addressed a similar question in another case involving a waiver of *Miranda* rights, *State v. McDevitt*, 484 So. 2d 543 (Ala. Crim. App. 1985). In that case, after *Miranda* rights were read to McDevitt and the police asked him whether he was willing to talk, he simply smiled. The *Miranda* rights were read to him later by Lt. Acker, before an interview, and McDevitt stated that he understood his rights and wanted to talk to Lt. Acker. Lt. Acker then asked McDevitt if he had spoken to an attorney, and McDevitt said that he had not. Lt. Acker told McDevitt that he thought McDevitt could use an attorney; McDevitt stated that he could not afford one and that he did not need one. He also said that an attorney would just take his money. Lt. Acker then interviewed McDevitt for approximately two hours. When federal agents attempted to interview McDevitt the next day, he told them he wanted to talk to his attorney first and that his attorney had not returned his telephone call. He agreed to talk to the agents "off the record." The agents informed a detective that McDevitt had requested an attorney. Over the next several days, other interviews were conducted by other officers and agents, and McDevitt confessed. Lt. Acker saw McDevitt at the jail on the day after he had confessed and asked McDevitt if he had an attorney yet. McDevitt told him that he had not obtained counsel and that he did not need an attorney. Approximately one month later, McDevitt was declared indigent and an attorney was

appointed to represent him.

The trial court granted McDevitt's pretrial motion to suppress his confession after determining that the prosecution had failed to establish that McDevitt knowingly and intelligently waived his *Miranda* rights during any of the interviews. *McDevitt,* 484 So. 2d at 547. This Court affirmed. In our opinion in that case, we acknowledged that McDevitt told Lt. Acker that he understood his rights and was willing to talk to him, but we also noted:

> " 'An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.... The courts must presume that a defendant did not waive his rights; the prosecution's burden is great....'
>
> "*North Carolina v. Butler,* 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979). In light of McDevitt's immediate subsequent statement that he '[c]ouldn't afford one, didn't need one,' the oral 'waiver' became unclear and ambiguous."

McDevitt, 484 So. 2d at 548 (footnote omitted).

Judge Patterson, writing for this Court, stated that we were unwilling to "give absolute deference to the isolated utterance of waiver" given to Lt. Acker and to disregard McDevitt's other statements and actions. *McDevitt,* 484 So. 2d at 549. We found "that the implication of these facts in their totality is that McDevitt did not fully

understand his right to appointed counsel." *Id.*

Relevant to the case before us, we further held in *McDevitt* that McDevitt's initial "waiver" of rights and his response to Lt. Acker's suggestion that McDevitt could benefit from counsel "clearly created a blatant ambiguity, thus obligating the officer to ensure that McDevitt fully understood his right to counsel." *McDevitt,* 484 So. 2d at 549. We further stated:

> " 'If the accused manifests a lack of understanding as to the meaning of these rights, or how they directly affect him, the interrogators must make special efforts to secure his understanding. Repetition of the warnings, and the giving of hypothetical factual examples may become necessary. These precautions will help to ensure that any waiver subsequently made is "knowing and intelligent." '
>
> "19 Am. Jur., *Proof of Facts* § 11 at 21 (1967). *See also id.* § 8 at 18. *It was the obligation of the interrogator not to ignore or gloss over the possible implications of McDevitt's response. He should have made an inquiry to clarify the ambiguity* and to specifically advise McDevitt, at that time, that appointed counsel would be provided, if desired, before the questioning proceeded."

McDevitt, 484 So. 2d at 549 (emphasis added).

Finally, in *McDevitt,* we noted that our holding in the case was not to be interpreted too broadly, but that when a suspect indicates that he or she might not have fully understood the *Miranda* warnings, the interrogating officer has a duty to ensure that the suspect fully and correctly

understood his rights. We stated that the "ritualistic reading" of the rights will not always be sufficient to fulfill the prosecution's obligation. *McDevitt*, 484 So. 2d at 550 (citing *United States v. Rondon*, 614 F. Supp. 667, 670 (S.D.N.Y. 1985)).

Our holding in *McDevitt* controls here. As in *McDevitt*, Collins made an ambiguous statement about counsel after the *Miranda* rights were read to her. Her first question to the officer indicated that she understood that she had the right to counsel, and that counsel might not be available to her immediately. The officer answered the question by indicating that Collins would have to wait for counsel. Collins then asked how long she would have to wait to obtain counsel. Collins's question indicated a desire for more information about the possible consequences of an invocation of her right to counsel, and that question was never answered. As in *McDevitt*, "It was the obligation of the interrogator not to ignore or gloss over the possible implications of [Collins's] response. He should have made an inquiry to clarify the ambiguity...." *McDevitt*, 484 So. 2d at 549.

The record indicates that Collins had retained counsel at trial. Therefore, at a minimum, in response to Collins's question regarding how long she would have to wait for an attorney, the officer interrogating Collins should have told Collins that she was free to contact her attorney before she answered any questions or that an attorney would be appointed if she was indigent. The officer should have clarified then whether Collins wanted to contact an attorney. Instead, the officer ignored Collins's question for several seconds while avoiding her gaze, and he then placed the waiver form in front of her for her signature. We note that the officer chose to answer the first question, informing her that she would have to wait for counsel, a response that might have encouraged Collins to give a statement immediately. He chose not to answer the second question,

the response to which, depending on his answer, might have encouraged her to invoke her right to counsel immediately. If the officer had determined that Collins could retain counsel and he told her that she could make a telephone call at that time, she might have invoked her right to do so. Because she did not receive an answer to her second question, Collins might have believed that several days would pass before she could contact an attorney.

As in *McDevitt*, we have before us a "waiver of rights" in that Collins signed the waiver-of-rights form the officer placed in front of her. However, as in *McDevitt*, the totality of the circumstances prevents us from giving absolute deference to this form. Instead, we find that Collins's question, "And *I will have to wait* til when?" regarding the length of time it would take to get an attorney implies that she, perhaps, wanted to contact an attorney. This question should have been answered, and the interrogating officer should have clarified whether Collins was asking to talk to an attorney. The officer's failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature prevents us from determining that Collins's signature on the form satisfied the State's burden of proving that she knowingly and intelligently relinquished her rights. Without proof of a knowing and intelligent waiver, the trial court correctly granted Collins's motion to suppress the statement.

The State contends that *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), mandates a reversal of the trial court's ruling. In *Davis*, the United States Supreme Court held that, after a suspect waives his *Miranda* rights, questioning must cease during an interrogation only when the suspect makes an unambiguous and unequivocal invocation of the right to counsel. The United States Supreme Court did not in *Davis* create a requirement that officers ask clarifying questions when an ambiguous assertion of the right to counsel was made, although the

Court acknowledged that asking questions for clarification would often be good practice for officers. In *Davis*, the suspect made an equivocal statement regarding counsel after he had already waived his *Miranda* rights. *Davis*, 512 U.S. at 461, 114 S. Ct. 2350 ("We therefore hold that, *after* a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." (emphasis added)). This Court has not specifically considered whether *Davis* applies to pre-waiver situations, but other appellate courts have considered this issue. We agree with the analysis and decision as discussed in *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557 (2004), and we adopt it here.

The Court in *Freeman* stated:

> "We are persuaded by the reasoning of the court in *State v. Leyva*, 951 P.2d 738 (Utah 1997), which distinguishes between an ambiguous response to an initial *Miranda* advisement and an equivocal post-waiver invocation. The Supreme Court of Utah declined to apply *Davis* to an ambiguous pre-waiver response, concluding that *Davis* was limited to a post-waiver ambiguous invocation of rights. *Id.* at 745. According to the Utah court, that scenario is an 'entirely separate' issue from an ambiguous pre-waiver invocation. *Id.*
>
> "Noting that *Davis* did not 'address' or 'extend to prewaiver scenarios ....', the Utah court said that '*Davis* made clear that its holding applied only to a suspect's attempt to *reinvoke* his *Miranda* rights "*after* a knowing and voluntary waiver" of the same.' *Id.* (quoting *Davis*, 512 U.S. at 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362). Therefore, the Utah court

> concluded that an officer faced with an ambiguous response to an initial advisement of *Miranda* rights, i.e., at the pre-waiver stage, is limited to posing questions designed to clarify the suspect's ambiguous response. *Id. Accord State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (adopting *Leyva* and concluding that '[t]he *Davis* holding obviously applies to instances where suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights. *Davis*, in sum, applies to an equivocal postwaiver invocation of rights.').
>
> "We agree with the Utah court that a careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights. Based on the foregoing, we decline to apply the rationale of *Davis* to our analysis of appellant's silence, because the silence occurred in a pre-waiver context."

Freeman, 158 Md. App. at 428-29, 857 A.2d at 572-73.

Therefore, we hold that *Davis* does not apply to this case. Collins's questions were directed to the delay involved in obtaining a lawyer, and she asked them before she signed the waiver-of-rights form. Because Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity. The United States Supreme Court's decision in *Davis* did not preclude the trial court from granting the relief Collins requested in her motion to suppress. To the

contrary, because Collins asked, "And I *will have to wait* til when?" (Supp. R. 15)(emphasis added), and because the officer ignored the question, there remained an ambiguity regarding whether Collins wanted to talk to an attorney. We find that, under the facts of this case, the officer had a duty to clarify on the record whether Collins wanted to contact her own attorney, whether she was indigent and needed appointed counsel, or whether she wanted to waive her *Miranda* rights and answer questions. From the record before us, we cannot find the knowing and voluntary waiver of rights required by *Miranda.*

The trial court correctly granted the motion to suppress; we affirm.

AFFIRMED.

McMILLAN, P.J., concurs.
SHAW, J., concurs in the result, with opinion.
BASCHAB, J., dissents, with opinion.
WISE, J., dissents.

SHAW, Judge, concurring in the result.

I believe that the particular facts of this case are controlled by *State v. McDevitt,* 484 So. 2d 543 (Ala. Crim. App. 1985). A police officer, faced with a suspect's ambiguous response to an initial advisement of *Miranda* rights, i.e., at the pre-waiver stage, as was the interrogating officer here, must ask clarifying questions to ensure that the suspect fully understands his or her constitutional rights. A suspect must understand the *Miranda* rights before there can be a knowing and intelligent waiver of those rights. Based on my interpretation of the videotape of Collins's statement, although the question is certainly debatable, I do not believe that this case involves an ambiguous assertion of the right to counsel and, contrary to the State's contention, I do not believe that the trial court's ruling in this case is due to be

reversed on the authority of *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

This is, admittedly, a close case. After reviewing the videotape at length, I can find no tangible basis upon which to disagree with the trial court's conclusion that the State failed to prove that Collins fully understood her right to counsel. Considering the totality of the circumstances present here, specifically, Collins's demeanor, her attempt to clarify exactly when, should she request one, she would be entitled to speak with an attorney, the interrogating officer's refusal even to acknowledge her when she asked how long she would have to wait to speak with an attorney, and the lack of an oral response indicating that she understood her rights, I am not persuaded that the " 'high standards of proof' " for a knowing and intelligent waiver were met in this case, *McDevitt*, 484 So. 2d at 548, quoting *Miranda*, 384 U.S. at 475, 86 S. Ct. 1602, i.e., I am not persuaded that the State established that Collins fully understood that she had the right to contact an attorney immediately or that, if indigent, she had the right to have an attorney appointed for her and that, upon the invocation of that right, all questioning by the police had to stop. It was incumbent on the police to ensure that Collins fully understood her rights before the officers undertook to solicit her waiver of those rights.

Although the underlying facts in *McDevitt* are different from those in the present case, what this Court stated in *McDevitt* is worth restating here:

> "In so holding, we caution that our ruling is not to be interpreted too broadly. We are not indicating that the formal *Miranda* requirements should be expanded. It would be unreasonable as well as impractical to impose the requirement upon officers that they enumerate to a suspect every

conceivable consequence of waiver of the warnings or that they place a legal interpretation on a suspect's actions or statements. 'Although a suspect must be apprised of his or her rights, providing a general legal education is not the business of the police or the courts.' *People v. Williams,* 62 N.Y.2d 285, 288, 465 N.E.2d 327, 329, 476 N.Y.S.2d 788, 790 (1984). We also do not mean to require the interrogator to detect the misunderstanding of clear warnings without some indication of misunderstanding. In other words, if no confusion or misunderstanding is manifested, the interrogator is not required to go beyond a reading of the *Miranda* warnings. What we do require, however, is that the *Miranda* warnings be clearly explained and if, after the suspect has indicated an understanding of those rights, he subsequently acts in such a manner as to reasonably alert the interrogating officer that the warnings may have been misunderstood, the officer must insure that the suspect fully and correctly understands his *Miranda* rights. This is 'to insure that what was proclaimed in the Constitution ha[s] not become but a "form of words," ' 384 U.S. at 444, 86 S. Ct. at 1612; in other words, the ritualistic reading of the *Miranda* warnings will not always, without exception, sufficiently apprise an accused of his rights. The *Miranda* warnings are not to be treated as 'a mere textual formality to be recited on the way to eliciting a confession.' *United States v. Rondon,* 614 F. Supp. 667, 670 (S.D.N.Y. 1985)."

484 So.2d at 549-50.

I do not believe that the "ritualistic reading" of *Miranda* rights was sufficient to overcome the inference of misunderstanding manifested by Collins's questions and conduct during the initial stages of her interrogation by the police. For these reasons, I agree that Collins's statement was properly suppressed; however, because I disagree with some of the language in the main opinion, I must respectfully concur only in the result.

BASCHAB, Judge, dissenting.

My review of the videotape of the appellee's statement indicates that the officer read the appellee her *Miranda* rights and specifically advised her that she had the right to counsel before she was interrogated; that the appellee indicated her understanding of those rights by her subsequent statements and questions; that the officer responded to the appellee's questions by presenting the waiver-of-rights form to her; and that the appellee read the waiver-of-rights form and signed it. Under these facts, there was not any ambiguity as to whether the appellee wanted to talk to an attorney. Rather, the appellee was fully advised of, unambiguously understood, and voluntarily waived her *Miranda* rights. Accordingly, the trial court improperly granted the appellee's motion to suppress, and I respectfully dissent.

* * *

FN1. The videotape of the statement is in the record, as is the transcript of the statement. This Court has reviewed the videotape and the transcript.

FN2. *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

FN3. *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

STATE OF ALABAMA,

APPELLANT,

vs. CRIMINAL ACTION
CASE NO. CC-02 - 972

CASSANDRA COLLINS,
DEFENDANT.

_____/

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS
DECEMBER 22, 2003

MONTGOMERY COUNTY COURTHOUSE
COURTROOM 3 - B

BRFORE: THE HONORABLE TRACY S. McCOOEY
CIRCUIT JUDGE

APPEARANCES

ON BEHALF OF THE STATE:
SCOTT GREEN, ESQUIRE
VERNETTA PERKINS, ESQUIRE
DEPUTY DISTRICT ATTORNEY
FIFTEENTH JUDICIAL DISTRICT
MONTGOMERY, ALABAMA

ON BEHALF OF THE DEFENDANT:
MARY GOLDTHWAITE, ESQUIRE
MONTGOMERY, ALABAMA

PROCEEDINGS

THE COURT: Okay. We've got Cassandra Collins, State of Alabama versus Cassandra Collins, and this is CC-02-972.

This is a suppression hearing, which the Court has reviewed the videotape that y'all supplied to me, and I'm ready to hear arguments.

I guess, Ms. Goldthwaite, it's y'all's motion.

MS. GOLDTHWITE: Judge, it's our contention that the videotaped statement and any other statements that were purportedly taken from my client, Cassandra Collins, should be suppressed, and the reasons are these. First, as you well know, statements are in and of themselves considered inadmissible. It's up to the State – it's the State's burden to prove that the statement – any statements taken from my client were given voluntarily, that they were given knowingly and that they were given intelligently. And they simply can't do that here.

I think the videotape itself, when you read it along with the transcript, clearly shows that my client did not know what her rights were, that –

THE COURT: And the Court, when I watched the videotape – and I guess this is what I want to hear from the State. When the officers were starting and reading her Miranda rights and then the defendant, Ms. Collins, specifically said how long will it take to get an attorney, and neither one of the officers answered her, and they just pushed in front of her the Miranda rights form to sign, that she knowingly was waiving and understood them. And I was concerned about that because she never got her question answered, and she specifically said how long will it take to get an attorney, and there was no response.

MS. GOLDTHWAITE: Judge, I'd like to elaborate. There – there was – exactly. There was complete silence. She first asked - she goes, I can have a lawyer, but I'll have - basically, she said, but I'll have to wait to get one. And

Corporal Humphries' response was, and that is correct. She then asked again, well, how long am I going to have to wait, and then there was – there was a really long pause, a silence.

THE COURT: Right.

MS. GOLDTHWAITE: He then pushed the Miranda form back in front of her and said read it and asked her again do you understand that. Well, she – there was – she didn't respond. She didn't understand it. She never – there's no indication verbally by any head nod, by any body language that she ever understood those rights.

THE COURT: And there was no response from the officers.

MS. GOLDTHWAITE: Correct.

THE COURT: We can get you an attorney in an hour; you'll have to wait a day; you can get one right now. There was nothing.

MS. GOLDTHWAITE: Right.

THE COURT: So, yes, let me hear –

MS. GOLDTHWAITE: Yes.

THE COURT: Mr. Green, what's y'alls – because you've watched the tape, too, Scott.

MR. GREEN: Yes, ma'am, I did watch the tape. And there was no verbal response, Judge, but to – there was a response in the fact that Ms. Collins did sign her waiver form indicating that she did understand her rights as they were given to her. And as the tape clearly shows, the rights were read to her.

Judge, the case law is very clear where Miranda rights are considered, that the defendant has to have an affirmative request for an attorney before she can invoke her rights to have an attorney present and it has to be unequivocal and unambiguous as to whether or not she wants an attorney there.

And the Courts have gone so far as to say that statements like, well, officer, do you think I need an attorney

or I think I need a lawyer are, in fact, ambiguous and equivocal and that they – they aren't a request for an attorney.

Judge, the Court in the U.S. v. Davis has said that they have refused to adopt a rule that requires an officer to ask any clarifying questions or back anything up as to whether she wants an attorney or not. It is, in fact, the defendant's responsibility to say I want an attorney, and it has to be unambiguous and unequivocal. And, Judge, the case law is rampant with that type of language.

THE COURT: And I – yes. And I know the cases you're talking about, because there's been lots of cases about, you know, whether or not this defendant is actually invoking their right to an attorney, whether they ask for one. The thing that really concerned me in this case was the – just the no – I mean, it was a specific question, how long will it take to get an attorney. And it was – if one of the officers had said, well, we can get one right now or it'll take an hour or whatever and then she just sat there, and they said are you ready to sign this, that would be one thing. But there was absolutely no answer to the question, which I still can't understand why there was no answer to the question. I mean, I think I know why, but I'm saying –

MR. GREEN: – Your Honor, I can't get inside Corporal Humphries' head –

THE COURT: Yes.

MR. GREEN: – and decide. But, Judge, I would add that the Supreme Court has said that Corporal Humphries was under no duty to answer any of those type of questions or to make it clear how long she would have to wait or whether she would have to wait.

THE COURT: Well, I think that the cases – which I went and read those again because we've had this issue. This isn't the first time –

MR. GREEN: Yes, ma'am, this –

THE COURT: – we've had this. So I went and reviewed those again. But I think this case is – it's just a

little different. But, again, y'all, it's – you know, I do not think – and the state that she was in on the tape, the question should have been answered. I don't think she knowingly and voluntarily did sign that and talk. I just don't think so.

Now, I'll be honest with y'all. It probably is a close call. It probably – which, you know, Scott, I'm going to grant the motion to suppress because I think it is due to be granted. But the State, I mean, I hope y'all will take me up on it and let's see what the courts say. It probably is a close call, but I do not think that that lady knowingly and voluntarily – the question should have been answered. You can get an attorney now. You can never get – it wasn't just one question. I mean, it was obvious that this lady was thinking about I want an attorney or I need an attorney. It was there for the officers, and the question should have been answered.

MR. GREEN: Well, Judge, like I said, the first question of will I have to wait if I want an attorney was answered. Corporal Humphries said, that's correct; you will have to wait in order to get an attorney. The second question of how long, Judge, I don't know if Corporal Humphries even knows the answer to that question. And, like I said, U.S. v. Davis has stated that he's under no burden to answer that.

THE COURT: And I agree – I mean, I think it – I mean, I'll be honest with you. It probably is a close call. I mean, it probably could go either way. But after – and I watched that tape twice, and I listened to the lady and I observed the lady. And I do not think that there's any question that she knowingly and voluntarily waived that. I just – it's due to be suppressed.

MR. GREEN: Judge, if the Court is inclined to suppress it, can I ask that you withhold a ruling until we can – until the Court can talk to Corporal Humphries and see what his rationale was for not answering the questions or, in

fact, whether he – whether he even knew the answer to the question.

THE COURT: But it doesn't even matter, because what I've got to look at is what's on that tape and the situation that was happening right there. And the defendant is the one who I've got to look at, and she was the one who was not told.

And I'll be honest with you. It needs to go up, Scott. Let's take it up. I mean, the Court might say, yes, you know, Judge McCooey is right; she didn't. The Court might say, hey, you know, Humphries didn't have to tell her anything; the State is right. You know, we don't have to do it. But we need a little clarification on this one.

But I think it's due to be suppressed based on the law, and legally, it is due to be suppresses. I – is this the State's whole case, this statement?

MR. GREEN: Judge –

THE COURT: I wouldn't think so. I mean wasn't the car damaged and weren't there –

MR. GREEN: Yes, ma'am. It –

THE COURT: – other things that led them to –

MR. GREEN: It doesn't –

THE COURT: I don't think this is the case.

MR. GREEN: It doesn't cripple the case, but it does put a big – kind of a big hammer in proving her reckless intent without the statement.

THE COURT: Sure. I understand. Well, like I said, I'm granting the motion to suppress, but the State, you know, y'all mandamus me on it and take it up.

MR. GREEN: Well, Judge, for the Record, can we get a clarification on what the law is that's – that you're basing the ruling on?

THE COURT: Well, I'm basing the ruling on that this Court watched the tape twice. I sat and observed it. When the lady was – asked the question how long will I have to wait, there was dead silence for a long time, and then the

form was pushed in front of her to sign. Well, here's the form that you knowingly, you understand, da, da, da, da. The officers never answered her question. It was evident to this Court that the defendant was trying to get into an attorney; I might need an attorney. Something should have been said, and it wasn't. And it just – you – there's no way that this Court in good conscience watching that videotape can say that lady knowingly and voluntarily waived her right to an attorney.

MR. GREEN: Judge, I guess my question was that – because I directed the Court to U.S. v. Davis that where it says the police are under no obligation to ask any clarifying questions and you said that this case was different. And I guess for purposes of a mandamus, I –

THE COURT: Yes, it is different because they had a direct question.

MR. GREEN: I need something to direct my –

THE COURT: They had a direct question. How long will it take to get a lawyer.

MR. GREEN: Yes, ma'am.

THE COURT: You see? I mean, they had a direct question to them. It wasn't, well –

MR. GREEN: I just need something –

THE COURT: In other words, it wasn't like the Davis case. It was not a question in this format. If the lady had said something like, well, you know, I might want an attorney or something to that nature, that's what the Davis case is saying. They don't have to sit there and ask.

MR. GREEN: I think in Davis they were asking – actually, they asked the officers do you think I need an attorney, and they said that the officers were under no obligation to get –

THE COURT: That's right. And that – in this case it was a direct question, how long will it take to get an attorney. I think it's a little different in the Davis case. The facts, I think can be distinguished.

MR. GREEN: Okay.

THE COURT: Now, the Court of Criminal Appeals or the Supreme Court might say, no, this really isn't distinguishable. I mean, even though it's a different question, we think that it's in line with Davis, so the officer didn't have to answer it. But I think it is distinguishable. And so that's what they're going to have to look at.

MR. GREEN: Yes, ma'am.

THE COURT: That's what it's going to come down to. And I'll be honest with y'all. I think it is a close call. But I think I've got to go on watching the tapes, the law, that it is distinguishable, and let the Court say what they might say.

So that's it. I'm going to grant the motion to suppress on the statement. And then, like I said, y'all take me up, and we'll see what the Court of Criminal Appeals says.

MR. GREEN: Judge, I know that we're kind of in a hurry for a trial date, but I do plan to take it up. Can we at least see what the Court of Criminal Appeals is going to do before we set a trial date?

MS. GOLDTHWAITE: And I will reiterate that there is a motion for speedy trial that is pressing. And I want to just put that on the Record.

THE COURT: Yes. And I understand. And I'm going to — I mean, in all fairness to — I mean, Ms Collins, she's out on bond, and it all — the State, I mean, I'm going to let y'all take it up, because, obviously, if they agree with you, we can use the statement, then fine. And if we can't, then we'll go forward in that nature.

MR. GREEN: I'll be honest, Judge. I don't know how long it's going to take them. I only have seven days to get my stuff in. It shouldn't be very long after —

THE COURT: I don't think it will take them long. And, I mean, it might be nice, Scott, if y'all would put in there that we do have a motion for a speedy trial and that we would need this decided quickly. Just put in there to let them know that we're waiting on this.

MR. GREEN: I'll take care of that.
THE COURT: Okay. Thank you.

CERTIFICATE

STATE OF ALABAMA)
COUNTY OF MONTGOMERY)

I, VICKI H. CLARK, OFFICIAL COURT REPORTER IN AND FOR THE FIFTEENTH JUDICIAL CIRCUIT, MONTGOMERY COUNTY ALABAMA, DO HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE FOREGOING HEARING AS STATED IN THE CAPTION HEREOF; THAT MY SHORTHAND NOTES WERE LATER TRANSCRIBED BY ME OR UNDER MY SUPERVISION, AND THAT THE FOREGOING PAGES NUMBERED 2 THROUGH 14, BOTH INCLUSIVE, REPRESENT A FULL, TRUE AND CORRECT TRANSCRIPT OF SAID PROCEEDINGS; THAT I AM NEITHER KIN NOR OF COUNSEL TO ANY PARTIES IN THIS PROCEEDING NOR IN ANY WAY INTERESTED IN THE RESULTS THEREOF.

DATED THIS THE 17TH DAY OF FEBRUARY, 2004.

/S VICKI H. CLARK
VICKI H. CLARK
OFFICIAL COURT REPORTER

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2005-2006

1040994

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

Cassandra Marie Collins)

(Montgomery Circuit Court, CC-02-972;
Court of Criminal Appeals, CR-03-0466)

Released February 24, 2006.

SMITH, Justice.

The petition for writ of certiorari is quashed. See State of Alabama ex rel. Ohio v. E.B.M., 718 So. 2d 669, 671 (Ala. 1998); Wofford v. Safeway Ins. Co. of Alabama, 624 So. 2d 555, 559 (Ala. 1993); Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992). Our quashing of the writ should not be construed as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion, including its discussion of State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985). See Horsley v. Horsley, 291 Ala. 782, 280 So. 2d 155 (1973).

WRIT QUASHED.

Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Bolin, and Parker, JJ., concur.

(3)

No. 05-1378

Supreme Court, U.S.
FILED
JUN 30 2006
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,
Petitioner,

v.

CASSANDRA COLLINS,
Respondent.

On Petition for Writ of Certiorari
To the Alabama Court of Criminal Appeals

BRIEF FOR RESPONDENT CASSANDRA COLLINS IN OPPOSITION

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June 30, 2006

QUESTION PRESENTED

The lower courts' rulings were based on traditional Zerbst-like voluntariness analysis. Petitioner now presents an entirely separate issue, whether Davis v. United States, 512 U.S. 452 (1994), should be expanded to pre-waiver situations. Petitioner failed to pose this question in any lower proceeding and has failed to comply with Supreme Court Rule 14.1(g)(i).

Therefore, the sole issue properly before the Court is whether a writ of certiorari should be granted under these facts.

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JURISDICTION

In order to establish jurisdiction under §1257(a), Petitioner must show that it presented the particular claim at issue here with "fair precision and in due time." Adams v. Robertson, 520 U.S. 83, 87 (1997), citing New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980). Further, when the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented, Adams, 520 U.S. at 86-87 (1997), citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987), and Petitioner bears the burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here," Adams, at 86-87, citing Webb v. Webb, 451 U.S. 493, 501 (1981).

This Court does not have jurisdiction under 28 U.S.C. §1257 because Petitioner's Question Presented was never presented to the Alabama Supreme Court.

STATEMENT OF THE CASE

A. Relevant Facts

The pertinent facts for purposes of these proceedings are as follows: On July 21, 2001, police brought Cassandra Collins ("Collins") in for interrogation. At the time, Collins was barely twenty-one years old, with no prior experience with the criminal justice system. (See Clerk's Record ("CR") at 7; Motion to Suppress Statements ("Mot. Suppress") at ¶9).

Immediately prior to giving her videotaped statement Collins was read her Miranda rights. (See Supplemental Clerk's Record ("Supp. CR") at 12, 14-15). Collins'

videotaped interview reveals that she had no understanding of this right before she signed the boilerplate waiver of rights form.

A videotaped exchange between Collins and police corporal G. H. Humphrey highlights Collins' misunderstanding regarding when she was entitled to see a lawyer. This exchange, which occurred after Collins' rights were read to her, but *before* she signed the waiver of rights form, is set forth below:

> Humphrey: Before asking you any questions, I must explain to you that you can remain silent, that anything you say can be used against you in court, that you can talk to a lawyer first and that you have the right to the advice and presence of a lawyer even though you cannot afford to hire one. If you cannot afford to hire a lawyer and want to have one present during interrogation, the court will appoint one before we question you. If you want to answer questions now you can do so, but you can stop answering at any time. You understand those Rights I just read to you?
>
> Collins: Okay, let me ask you a question, it says that I have, I can have a lawyer, I will have to wait to get one.
>
> Humphrey: And that's correct.
>
> Collins: I will have to wait till [sic] when?
>
> *Silence*
>
> Humphrey: Okay, this is my signature, I want you to read this paragraph right here out loud.
>
> (*As instructed, Collins read the paragraph out loud.*)

(Supp. CR at 14-15).

Although she was asked twice if she understood her rights immediately before signing the waiver of rights form, Collins never indicated that she understood her rights. See id. To the contrary, it is plain from the videotape that Collins incorrectly understood that she would have to wait until after she was questioned to get an attorney. See id.

When Collins sought clarification regarding her Miranda right to counsel, Corporal Humphrey unequivocally told Collins that her understanding that she would "have to wait to get" an attorney was correct. (Supp. CR. at 15). Collins then followed up on Corporal Humphrey's deliberate misstatement and asked how long she would have to wait. Id. Neither of the two officers present in the room ever responded to her question. Id. The officer administering her rights ignored Collins' critical question for approximately ten seconds and avoided her gaze, before placing the waiver form in front of her for her signature. (Petitioner's Appendix ("Pet'r. App.") at 5a, 9a.).

B. Proceedings Below

At every court below, Collins has consistently maintained that her statement should be suppressed because she did not validly waive her rights under the totality of the circumstances. The State unsuccessfully attempted to dodge this bullet by trying to redirect the focus of the trial court and Court of Criminal Appeals from the waiver issue to an issue about invoking the right to counsel addressed in Davis, 512 U.S. 452. Refusing to be manipulated into leap frogging over the waiver issue, the trial court and the Alabama Court of Criminal Appeals ruled that the dispositive issue was whether, under the totality of the circumstances, Cassandra Collins voluntarily, knowingly and intelligently waived her right to counsel under Miranda before giving her statement.[1] Both courts held that from the record they could not find a knowing and voluntary waiver of rights as required by Miranda. (Pet'r. App. at 10a, 13a, 23a.).

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[1] Notwithstanding Petitioner's claims to the contrary, the record reflects that the lower court decisions were *not* based on whether Cassandra Collins invoked her right to counsel under Davis. Davis is simply not applicable to whether, under the totality of the circumstances, Collins knowingly and intelligently waived her right to counsel. Hart v. Attorney General of the State of Florida, 323 F. 3d 884, (11th Cir. 2003).

Not surprisingly, considering the facts and rulings in this case, the State completely dropped the Davis argument in its brief filed in support of its application for rehearing to the Court of Criminal Appeals. In fact, the State never bothered mentioning Davis or Edwards v. Arizona, 451 U.S. 477 (1981), when it petitioned the Alabama Supreme Court for certiorari. Now the State attempts to belatedly breathe new life into an irrelevant and long dead issue based on a question that was never presented to the courts below.

1. Trial Court

On September 2, 2003, Collins filed a motion to suppress, asking the trial judge to suppress her videotaped statement to police, wherein she consistently maintained that she never understood her rights under the circumstances surrounding her waiver. (Pet'r. App. at 2a; CR at 4-8; See Mot. Suppress). Collins argued that: (a) "the totality of the circumstances shows that the videotaped statement was involuntary and taken in violation of state and federal constitutional guarantees" (CR at 7); (b) her misconception regarding her Miranda rights was caused when Corporal Humphrey "misled Ms. Collins to believe that she had to wait to get an attorney until after she was interrogated by him" (CR at 6); and (c) it was while she was "operating under this misconception, deliberately created and fostered by Corporal Humphrey," that she waived her constitutional right to talk with an attorney before giving the videotaped statement (CR at 6).

On December 22, 2003, after reviewing the videotape of Collins' statement, the trial judge conducted a hearing on Collins' motion to suppress. (Pet'r. App. at 18a). The trial judge focused on the totality of the circumstances surrounding the waiver, including

the conduct of the police and their deliberate refusal to answer, much less clarify, Collins' question regarding her Miranda right to counsel.

In reviewing the facts, the trial judge was understandably dismayed[2] about the police officers' refusal to clarify Collins' direct question reflecting her confusion and misunderstanding about her right to an attorney, especially since the officers had deliberately contributed to it.

Defense counsel argued that "the videotape itself, when you read it along with the transcript, clearly shows that [Collins] did not know what her rights were." (Pet'r. App. at 18a). The trial judge agreed,[3] holding that Collins had not knowingly or voluntarily waived her right to an attorney. (Pet'r. App. at 2a).

Although in her motion to suppress Collins made a passing reference that she had invoked her Miranda right to counsel prior to being interrogated (CR at 7; Mot. Suppress at ¶8), the overwhelming thrust of her argument focused around the totality of the circumstances. Nevertheless the State seized on this isolated contention and unsuccessfully and incorrectly relied on Davis as the controlling authority in this case at the suppression hearing. Having ruled against the State on the threshold issue of voluntariness, the trial judge never reached the Davis issue of whether Collins had invoked her right to counsel.

The record is devoid of any basis for Petitioner's claim that the statement was suppressed "*entirely* on the basis that Collins' waiver was *per se* invalid because police

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[2] "THE COURT: But there was absolutely no answer to the question, which I still can't understand why there was no answer to the question. I mean, I think I know why..." (Pet'r. App. at 20a).

[3] In fact, throughout the suppression hearing the trial judge reiterated this position, stating, "... I watched that tape twice, and *I listened to the lady and I observed the lady. I do not think that there is any question that she knowingly and voluntarily waived that.* I just – it is due to be suppressed." (Pet'r. App. at 21a) (emphasis added), and by restating that "*there's no way that this Court in good conscience, watching that*

did not terminate the interview immediately following Collins' ambiguous statement about counsel." (Pet. for Writ at 4) (emphasis added). Also, there is simply no basis for Petitioner's claim that the trial judge, in addition to the Court of Criminal Appeals, employed a *per se* analysis under Edwards v. Arizona, 451 U.S. 477 (1981).[4]

Furthermore, notwithstanding Petitioner's unsubstantiated argument to the contrary, there is nothing in the record to reflect that the trial judge was "bothered" (Pet. for Writ at 4) by the officers' failure to terminate the interview immediately following Collins' question about counsel. The evidence reflects that the trial judge was bothered by the officers' failure to mitigate Collins' confusion regarding her Miranda right to counsel, which they are obligated to do under State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985). Moreover, despite what Petitioner would have one believe, it is clear from the record that the trial judge never addressed the questions of whether Collins invoked her right to counsel or whether the officers should have terminated the interview following Collins' question about counsel[5] (Pet. for Writ at 6).

It is the trial judge's duty to determine whether a statement is voluntary and, unless it appears so, the statement should be excluded. Farrior v. State, 728 So. 2d 691 (Ala. Crim. App. 1998). Whether a waiver is voluntary, knowing and intelligent depends on the particular facts and underlying circumstances of each case, including the background, experience and conduct of the accused – the totality of the circumstances. Click v. State, 695 So. 2d 209, 218 (Ala. Crim. App. 1996).

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video tape can say that lady knowingly and voluntarily waived her right to an attorney." (Pet'r. App. at 23a) (emphasis added).

[4] The Court of Criminal Appeals opinion never mentions Edwards.

[5] Collins expressed her confusion about her Miranda right to counsel *before* the police interview began and *before* she signed the waiver of rights form. Thus, the issue was never whether the police should have terminated the interview immediately following Collins' statements about counsel, as Petitioner claims

The burden is on the State to show voluntariness and a Miranda predicate before such a statement can be admitted into evidence. Lewis v. State, 535 So. 2d 228 (Ala. Crim. App. 1988). The trial prosecutor never addressed this issue, other than to say Collins' rights were read to her and she signed the form. (Pet'r. App. at 19a).

The State failed to meet its acknowledged (Pet. for Writ. at 27) burden of demonstrating that Collins' waiver was valid. The State did not, as alleged, apply the "standard totality-of-the-circumstances" analysis to this case (Pet. for Writ. at 6) but instead narrowly focused on one point, namely the ritualistic reading and signing of the Miranda rights waiver form.[6]

The applicable precedent is clear that the ritualistic reading and signing of Miranda rights is not enough to establish a knowing and voluntary waiver. The reading of rights in this case was clearly not interactive or meant to be meaningful, as evidenced by the officers' complete disregard of Collins' questions. The question is not one of form but whether the defendant in fact knowingly and voluntarily waived the rights delineated in Miranda. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Moreover, if the mere ritual were enough, there would be no need to look at the totality of the circumstances surrounding the reading and signing of Miranda rights waivers. The State ignored Collins' background, experience, conduct and statements, including that she gave "no indication verbally, by any head nod, by any body language, that she ever understood those rights." (Pet'r. App. at 19a). The State also ignored the

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(Pet. for Writ at 4). In fact, since there was no interview to terminate, the word "terminate" does not appear in either the Court of Criminal Appeals decision, or the transcript of the suppression hearing in question.

[6] Only once, at the end of its original brief to the Court of Criminal Appeals does the State refer to the "totality of circumstances" standard and then only in a conclusory and unsubstantiated fashion. (Brief of Appellant ("Br. of Appellant") at 24).

conduct of their police. The totality of these facts reflects that Collins did not knowingly, voluntarily or intelligently waive her Miranda rights.

In light of the foregoing, the trial prosecutor sought to divert attention away from the waiver issue by repeatedly asking the trial judge to base its decision regarding the admissibility of Collins' statement on Davis, misguidedly insisting that "the *case law is very clear*[7] where Miranda rights are considered, that the Defendant has to have an affirmative request for an attorney before she can invoke her rights to have an attorney present and it has to be unequivocal and unambiguous as to whether or not she wants an attorney there." (Pet'r. App. at 19a) (emphasis added). Refusing to be diverted to the invocation issue raised by the prosecutor's Davis argument, the trial court instead remained focused on the waiver issue and the circumstances surrounding "the state [Collins] was in on the tape" (Pet'r. App. at 21a) when the officers were going through the motions of administering her Miranda rights to her.

2. Alabama Court of Criminal Appeals

The trial judge decided this case on the waiver issue. Thus, notwithstanding Petitioner's protestations to the contrary, it was the prosecutor that remained "fixat[ed] on the invocation issue" (Pet. for Writ at 5), not the trial judge. Then, in its original brief and reply brief to the Alabama Court of Criminal Appeals, it was the State that zealously echoed the trial prosecutor's mistaken statement of law regarding Davis. (See Brief of Appellant ("Br. Appellant"),[8] filed April 2, 2004; State's Reply Brief, filed May 21,

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[7] Having failed at both the trial court and the Court of Criminal Appeals to prevail under its "the case law is very clear" mantra with regard to Davis, and having abandoned this issue at the Alabama Supreme Court, the State is now proclaiming in its petition that the case law with regard to Davis is so unclear that clarification by this Court is necessary.

[8] For clarification, the Government inadvertently entitled their brief "Brief of Appellee" when, in fact, the Government was the Appellant. Here, Respondent will refer to said brief as "Brief of Appellant" to conform with Petitioner's title for same in its Petition for Writ of Certiorari.

2004). Also, without any basis, the State claimed that the trial court found "that Collins statement was not voluntary because it was given after she invoked her right to counsel."[9] (Pet. for Writ at 6).

The State asked the Court of Criminal Appeals to decide one issue: whether "the trial court erroneously grant[ed] Collins's motion to suppress her statement by applying a subjective standard rather than an objective standard to reach its conclusion that Collins invoked her right to counsel." (Br. Appellant at 6). The State now claims that it noticed three issues (Pet. for Writ at 5-6), but it plainly briefed just the one. The substance of the State's brief addressed this one question, focusing exclusively on invocation rather than the issue of waiver.[10]

Under the facts in this case, the Davis issue is an obvious red herring designed to throw the courts off in their consideration of the real issue in this case – whether Collins understood her Miranda rights in light of the totality of the circumstances. The Court of Criminal Appeals refused to be led down the wrong path by the Government's tack.

In describing the events leading up to Collins' waiver, the Court of Criminal Appeals used the following principles to determine whether Collins voluntarily waived her Miranda rights:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced

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[9] The Court of Criminal Appeals opinion never mentions that Collins "did indeed invoke her Miranda right to Counsel," as the State suggests. (Pet. for Writ at 4).

[10] "She did not unambiguously *invoke* her right to counsel. The trial court's ruling was based on a subjective determination that the officers should have answered Collins's questions." (Br. Appellant at 22).

> choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

(Pet'r. App. at 4a-5a) (internal citations omitted). Using these same principles and looking at the totality of the circumstances surrounding the waiver, the Court of Criminal Appeals concluded that Collins *did not* comprehend the full panoply of rights set out in the Miranda warnings, and therefore *did not* voluntarily waive her right to the presence of counsel, as more fully set out below:

> With these principles in mind, we turn to the evidence presented via the videotaped statement. The videotape indicates that Collins was in an office with two police officers. One officer read the Miranda rights to Collins. The officer stated during the initial portion of the videotape that he had read Collins her rights earlier that day. (Supp. R. at 14). After the officer read those rights to Collins, she said, "Okay, let me ask you a question[. It] says that I have, I can have a lawyer[.] I will have to wait to get one." The officer answered, "And that's correct." Collins asked, "And I will have to wait til when?" The officer did not respond. (Supp. R. 15.) Instead, the officer looked away from Collins and cast his eyes downward, onto the waiver-of-rights form, which he appeared to fill out while Collins waited for an answer to her question. After approximately 10 seconds passed, the officer placed the waiver-of-rights form in front of Collins and asked her to read the paragraph on the form.

(Pet'r. App. at 5a) (internal citations omitted).

Like the trial court, the Court of Criminal Appeals found the circumstances surrounding the administration of Collins' Miranda rights troubling, specifically noting that the officers ignored Collins' question[11] and instead remained silent approximately ten seconds, while avoiding her gaze. (Pet'r. App. at 5a). Then, without comment, the officer placed the waiver form in front of Collins for her signature. Id. at 9a.

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[11] "I will have to wait till [sic] when [to get an attorney]?" (Supp. CR at 15).

The Court of Criminal Appeals also noted that:

> ...[T]he officer chose to answer the first question, informing her that she would have to wait for counsel, a response that might have encouraged Collins to give a statement immediately. He chose not to answer the second question, the response to which, depending on his answer, might have encouraged her to invoke her right to counsel immediately.

(Pet'r. App. at 9a-10a).

Judge Shaw noted in his concurrence, in result only, the following circumstances surrounding Collins' waiver:

> Considering the totality of the circumstances present here, specifically, Collins' demeanor, her attempt to clarify exactly when, should she request one, she would be entitled to speak with an attorney, the interrogating officer's refusal even to acknowledge her when she asked how long she would have to wait to speak with an attorney, and the lack of an oral response indicating that she understood her rights, I am not persuaded that the 'high standards of proof' for a knowing and intelligent waiver were met in this case.

(Pet'r. App. at 14a) (internal citations omitted).

The State's representation to the lower courts that under Davis, a police officer need not ask clarifying questions on these facts, was mistaken and contrary to the clear precedent in Alabama requiring police officers to attempt to clarify a suspect's apparent misunderstanding regarding her Miranda right to counsel. State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985). The State ignored McDevitt until the Court of Criminal Appeals recognized McDevitt as the controlling authority in this case. (Pet'r. App. at 9a). Furthermore, once the Court of Criminal Appeals recognized McDevitt as the controlling authority in this case, the State abandoned Davis completely.

McDevitt does not address Davis or any issues relating to whether or not a suspect had invoked her right to counsel. Instead, McDevitt establishes as the threshold issue whether, under the totality of the circumstances, a suspect has validly waived her Miranda right to counsel, holding that the interrogating officer has a duty to ensure that the suspect fully and correctly understood her rights when the suspect indicates that she might not have fully understood the Miranda warnings. (Pet'r. App. at 8a-9a). Here, Collins indicated she did not fully understand the Miranda warnings. Instead of ensuring that Collins fully and correctly understood her rights as required under McDevitt, the interrogating officer refused to respond, thereby compounding her confusion.

In comparing the two cases the Court of Criminal Appeals of noted that:

> As in McDevitt, Collins made an ambiguous statement about counsel [[12]] after the Miranda rights were read to her ... As in McDevitt, 'It was the obligation of the interrogator not to ignore or gloss over the possible implications of [Collins'] response.' He should have made an inquiry to clarify the ambiguity...'

(Pet'r. App. at 9a) (internal citations omitted). Instead of challenging McDevitt, the State unsuccessfully attempted to distinguish the facts in McDevitt from Collins' by insisting McDevitt's "post-waiver statements objectively showed that the defendant did not fully understand his right to counsel" (State's Brief in Support of Application for Rehearing ("Br. Sup. Application for Reh'g.") at 1), but that Collins' statement "exhibited her understanding that she had a right to an attorney, the question only addressing how long she would have to wait for an attorney (Id. at 1-2). The State's sole argument to support its application for rehearing was that the Court of Criminal Appeals

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[12] The Petitioner plays fast and loose with the phrase "ambiguous statement about counsel" by manipulating it out of context to support its argument that the trial court erroneously employed an Edwards *per se* analysis in assessing the validity of Collins' waiver. (Pet. for Writ at 11, 14, 24, 25, 29) (footnote

ruling was "legally erroneous because, rather than reviewing all matters with an objective consideration of the totality of the circumstances, the majority applied a narrow subjective view of only one item in reaching its conclusion..." (Id. at 1).

The State completely discarded any arguments relating to the applicability of Davis after the Court of Criminal Appeals affirmed the trial judge's decision to suppress the statement. Davis is neither cited nor alluded to in the State's brief in support of its application for rehearing. Moreover, contrary to the arguments it has asserted in support of its petition for writ of certiorari here,[13] the State acknowledged therein that "The majority agreed with the trial court that Collins had not knowingly or voluntarily [or intelligently] waived her right to an attorney" and further "found that State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985) was the controlling authority." (Br. Sup. Application for Reh'g. at 4-5).

3. Alabama Supreme Court

The State also completely abandoned the Davis argument at the Alabama Supreme Court. Therefore, the Alabama Supreme Court never had the opportunity to address the Davis question presented herein to this Court. In petitioning the Alabama Supreme Court for review the State omitted any reference to Davis or Edwards. (State's Petition for a Writ of Certorari to the Court of Criminal Appeals of Alabama, filed April 8, 2005).

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added for emphasis).

[13] Flip-flopping from its concessions at the Court of Criminal Appeals, Petitioner now claims that the lower courts never made it to the question of whether Collins' waiver was voluntary, knowing, or intelligent, and that the statement was suppressed "*entirely* on the basis that Collins' waiver was *per se* invalid because police did not terminate the interview immediately following Collins' ambiguous statement about counsel." (Pet. for Writ at 4) (emphasis added).

Instead, the State focused on a totality of the circumstances analysis claiming that the decision of the Court of Criminal Appeals was in conflict with prior decisions of the Alabama Supreme Court which had purportedly applied an "objective" standard in determining whether, under the totality of the circumstances, a defendant knowingly and voluntarily waived her constitutional rights before making a statement. (Pet. for Writ at 3-4). The State also claimed that the decision of the Court of Criminal Appeals was in conflict with a prior decision by the Alabama Court of Criminal Appeals, namely McDevitt (Pet. for Writ at 8). Based solely on these two arguments,[14] neither of which is related to Davis, the Alabama Supreme Court granted the writ, which it subsequently quashed.

REASONS FOR DENYING THE WRIT

A. This Case Is the Wrong Vehicle for Deciding the Question Presented as Framed by the State.

1. The Question Presented as Framed by the State was Not Actually Presented to the State Courts as Required.

The very question presented for this Court's review was never raised in the state courts below. This poses an insurmountable obstacle since this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision this Court has been asked to review. Adams v. Robertson, 520 U.S. 83, 86 (1997), citing Heath v. Alabama, 474 U.S. 82, 87 (1985), Illinois v. Gates, 462 U.S. 213, 217-219 (1983), McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

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[14] And even in its request for oral argument to "significantly aid [the Alabama Supreme Court] in its determination of the issues presented," the State never mentioned Davis or Edwards. (See State's Request

Further, under Supreme Court Rule 14.1(g)(*i*) a petitioner seeking review of a state court judgment is required to specify in the petition (1) when the federal claims were raised in the state court system, (2) the method or manner of raising such claims, and (3) the way in which such claims were passed on by the state courts. For reasons set forth herein and above, Petitioner has not met this burden.

Petitioner is asking this Court to determine whether the holding in Davis, which only addresses the post-waiver scenario, should be expanded to apply to pre-waiver scenarios. (Pet. for Writ at i). It is Petitioner's burden to show that the question of whether Davis should apply pre-waiver was properly presented to the lower courts. It is assumed, however, that the issue was not properly presented where, as here, the highest state court is silent on the federal question before this Court. Adams, 520 U.S. at 86-87, citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987). To overcome this assumption, Petitioner must demonstrate that the state courts had "a fair opportunity to address the federal question that is sought to be presented here," Adams, 520 U.S. at 87, citing Webb v. Webb, 451 U.S. 493, 501 (1981). Petitioner simply cannot meet this burden since neither the Alabama Supreme Court nor the Court of Criminal Appeals addressed the question on which Petitioner is seeking certiorari, nor did they ever hear the above referenced new arguments on which this question is based.[15]

As grounds for granting certiorari on the Question Presented, Petitioner creatively fashions completely new arguments regarding the applicability of Davis to this case claiming that there is a "deep and entrenched" disagreement and "clear split" (Pet. for

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for Oral Argument ("State's Req. for Oral Arg.")).

[15] This Court has explained that it would be unseemly in our dual system of government "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." Adams, 520 U.S. at 87, citing Webb, 451 U.S. at 500.

Writ at 12) among the lower courts about whether Davis' clear invocation rule should be extended to apply to pre-waiver as well as post-waiver scenarios. (Pet. for Writ at 12, 13). Petitioner further argues that Davis should apply pre-waiver because to do otherwise is to be "unfaithful to the sensible policy that animates this Court's Davis decision." (Pet. for Writ at 12). Again, none of these arguments were made to any of the lower courts in this case.

In fact, until this petition the Government had never admitted, as it does here, that the holding in Davis only addresses the post-waiver scenario nor had the Government ever before discussed the alleged "deep and entrenched split in authority" (Pet. for Writ at i) regarding the applicability of Davis to pre-waiver situations, which Petitioner now urges this Court to address.

2. This Case was Not Decided on Davis.

This case is about the standard for waiving the right to counsel, not the standard for invoking it. Thus Davis does not apply. As noted above, the Court of Criminal Appeals' opinion begins with the rule that "[o]nly if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived" (Pet'r. App. at 5a), and unequivocally holds that there was no "proof of a knowing and intelligent waiver" (Id. at 10a). The opinion ends with the court reiterating that "[f]rom the record before us, we cannot find the knowing and voluntary waiver of rights required by Miranda" (Id. at 13a) and the concurring opinion explained that "the totality of the circumstances" preclude finding a "knowing and intelligent waiver" because the State failed to prove that Collins fully understood her right to counsel. (Id. at 14a).

Furthermore, in affirming the trial judge's decision to suppress Collins' statement the Court of Criminal Appeals specifically held that "[o]ur holding in McDevitt controls here." (Pet'r. App. at 9a). McDevitt does not address Davis or any issues relating to whether or not a suspect had invoked his right to counsel. Thus the dispositive issue addressed by the state courts was not Davis but whether under the totality of the circumstances Collins properly waived her Miranda rights. Petitioner acknowledged that this issue provides independent grounds for suppression. (Pet. for Writ at 10).

It was almost as an afterthought and only after it had already concluded that Collins did not knowingly and intelligently waive her rights that, at the State's repeated behest, the Court of Criminal Appeals briefly addressed Davis. In fact before it ever turned its attention to Davis the Court of Criminal Appeals held that "without proof of a knowing and intelligent waiver, the trial court correctly granted Collins' motion to suppress the statement" (Pet. for Writ. at App. 10a). Once the Court of Criminal Appeals found that Collins' waiver was invalid, the Davis issue became moot.[16]

As noted above, even the State concedes that once a court holds that a suspect did not knowingly and intelligently waive her rights, Davis' invocation issues become irrelevant. (Pet'r. App. at 10a). And the State has not asked this Court to review the Alabama Court of Criminal Appeals' holding that Collins did not knowingly and intelligently waive her Miranda rights. Accordingly, regardless of whether this Court reaches the Question Presented, the result in this case would remain the same. Collins'

[16]As the Court of Criminal Appeals correctly noted, Davis only applies when a suspect has validly waived her rights. Such was not the case here.

statement must be suppressed regardless of any ruling on the Question Presented. Consequently, there are no grounds for granting certiorari in this case.[17]

3. The State Abandoned Its Arguments on Davis Below.

On appeal, beginning with its argument in support of its application for rehearing to the Court of Criminal Appeals, the State completely abandoned Davis and instead focused entirely on the totality of circumstances. Nevertheless, after having prematurely abandoned Davis at the lower court, Petitioner now seeks to resurrect Davis to secure this Court's consideration by mischaracterizing the issues addressed by the lower courts in this case. Despite its attempts, however, Petitioner has failed to establish that it presented the particular claim at issue here with "fair precision and in due time." Adams v. Robertson, 520 U.S. 83, 87 (1997), citing New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980).

The State never addressed the alleged split in authority regarding the applicability of Davis to pre-waiver situations although the Court of Criminal Appeals virtually invited the State to do so when it noted, in what amounted to dicta, that although it had "not specifically considered whether Davis applies to pre-waiver situations...other appellate courts have considered this issue." (Pet. for Writ at 15). In addition, the State never challenged the Court of Criminal Appeals ruling based on its interpretation of Davis. Moreover, the State never challenged McDevitt which it now apparently seeks to overrule or change based on an alleged conflict between circuits.

Furthermore, in petitioning the Alabama Supreme Court for review, the State never mentions Davis or Edwards nor does it present any issues even relating to Davis or

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[17]Certiorari is unlikely when other grounds for affirmance may preclude the Court from reaching the question presented. See Robert L. Stern et al., Supreme Court Practice, at 455 (8th ed. 2002).

Edwards. Instead the State maintains its focus on whether the Court of Criminal Appeals erred by applying an alleged subjective review rather than an objective review of the totality of the circumstances surrounding the waiver of rights.[18] In light of the foregoing, this Court should not reach the question presented and the petition should be denied.

B. The Court of Criminal Appeals Correctly Decided this Case on the Merits.

In conformity with established precedent, the Court of Criminal Appeals affirmed the trial court's decision to suppress Collins' statement by holding that "from the record before us, we cannot find the knowing and voluntary waiver of rights required by Miranda." (Pet'r. App. at 13a). See also McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985); Hart v. Attorney General of the State of Florida, 323 F. 3d 884 (11th Cir. 2003). Thus, clearly there is no basis for Petitioner's claim that "the lower courts never made it" to the question of whether Collins voluntarily, knowingly and intelligently waived her rights under the totality of the circumstances" (Pet. for Writ at 4), but instead focused entirely on whether Collins had invoked her right to counsel as required under Edwards and Davis.

Furthermore, if the lower courts had, in fact, side-stepped the waiver issue as erroneously claimed by Petitioner, the lower courts would be in violation of established law. See Hart. Like Collins, Hart sought to suppress his statement arguing that his waiver was not voluntary, knowing, and intelligent because he was mislead as to the nature of the rights he was waiving. Yet, in contrast to what happened here, the state courts committed reversal error in Hart by bypassing the waiver issue and focusing solely on Davis in determining the admissibility of Hart's statement, finding that Hart had failed to

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[18] State's Brief in Support of Petition for Writ of Certiorari to the Court of Criminal Appeals at 2.

make a clear request for counsel as required. The Eleventh Circuit reversed[19] the state court's decision, holding that Hart's waiver was not voluntary, knowing and intelligent as required by Miranda, and that the state court's failure to identify and apply the correct legal rule, i.e. the totality of the circumstances, to the waiver issue resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court. Hart, 323 F. 3d at 892, 893, 895.

Moreover, Edwards, Davis, and their progeny reveal that the first step in any due process analysis regarding the admissibility of a statement is determining whether a statement was voluntary, knowing, and intelligent under the totality of the circumstances. It is only after the court has made the threshold determination regarding whether a statement is voluntary, knowing and intelligent that the issues in Edwards and Davis arise. Since the trial judge determined that Collins' statement was not voluntary, knowing and intelligent, the issues addressed in Edwards[20] and Davis do not arise.

Significantly, Davis, which provides insight as to how to apply Edwards, reiterated the well-settled law that "[a] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, *and that the police must explain this right to him before questioning begins.*" Davis,at 457 (emphasis added).

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[19] After signing the waiver form that had been "carefully explained" to him, Hart asked additional questions regarding his rights including the pros and cons of having a lawyer. The court concluded, after looking at the totality of the circumstances surrounding the interrogation, that Hart's waiver "was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). Hart at 893.

[20] After he voluntarily, knowingly and intelligently relinquished his right to counsel, Edwards proceeded to give a statement to the police. The suppression issue arose much later after the police reinitiated contact with Edwards following his request for an attorney "before making a deal." Edwards at 478-479.

The police refused to explain this right to Collins. This is especially egregious given Collins expressed misunderstanding about her right to counsel, which police deliberately perpetuated. The Davis court also noted that, "a suspect who knowingly and voluntarily waives his right to counsel, after having that right explained to him, has indicated his willingness to deal with the police unassisted." Davis, at 460-461. Collins never had her rights explained to her correctly. Therefore, the case was properly decided on the threshold issue of voluntariness, precluding the lower courts from ever reaching the Davis/Edwards issue.

Finally, the Court of Criminal Appeals noted that this Court's decision in Davis did not preclude the trial court from granting the relief Collins requested in her motion to suppress. (Pet'r. App. At 12 a). The holding in Davis only addresses the post-waiver scenario: "We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." Therefore, the Court of Criminal Appeals did not apply Davis to the facts of this case, and that the statement was due to be suppressed on independent grounds.

C. The Purported Split Among the Courts is Not Real

Notwithstanding the Petitioner's protestations to the contrary, (Pet. for Writ at 8, 11, 29), the Collins' decision was based on a run of the mill application of the traditional Zerbst-like voluntariness analysis. Dissatisfied with the Court of Criminal Appeals fact bound application of that analysis in this case, the Petitioner has not only reinvented the legal issues upon which this case was decided, but now claims that this non-existent decision relates to a purported conflict of law that does not exist.

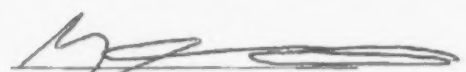
A straightforward reading of the decision below reflects that it turns upon its own facts. Consequently, few others besides the litigants will be affected by it. Furthermore, it cannot be said that another court would reach a different result on the same or very similar set of facts. Under these circumstances, the granting of certiorari would be inappropriate for reconciling the purported split involving a legal issue that was never presented with the clarity needed for effective adjudication.

Certainly none of these allegedly conflicting cases appear to suggest that Davis is relevant where, as here, a waiver is deemed invalid under the totality of the circumstances. They, in fact, appear to agree that these are entirely separate issues. As Petitioner itself concedes, "The fact that the State bears the burden in the normal course of proving a waiver's validity *has nothing at all to do* with whether a suspect should be required to speak clearly in order to obtain the benefit of the heightened, *per se* waiver rule that applies under Edwards." (Pet. for Writ at 28).

CONCLUSION

For the foregoing reasons, Cassandra Collins respectfully requests that this Honorable Court deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,



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No. 05-1378

In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

Cassandra COLLINS,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Court of Criminal Appeals

REPLY BRIEF FOR PETITIONER

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July 11, 2006

QUESTION PRESENTED

In *Davis v. United States*, 512 U.S. 452 (1994), this Court held that in order to trigger the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which deems *per se* invalid any confession or *Miranda* waiver following a suspect's request for the assistance of counsel, the suspect must "unambiguously" invoke his right to counsel.

The question presented here is whether *Davis*' clear-invocation rule applies only after a suspect has waived his *Miranda* rights and then, during interrogation, makes an ambiguous reference to a lawyer or, instead, also applies when the suspect ambiguously references a lawyer during the initial *Miranda* colloquy. There is a deep and entrenched split of authority on that question, which this case squarely implicates. The court below held that *Davis*' clear-invocation rule applies only in the post-waiver setting, as have the courts in Alaska, Maine, Maryland, South Dakota, and Utah. By contrast, the Seventh and Tenth Circuits, along with the state courts in Arkansas, California, the District of Columbia, Georgia, Illinois, Kansas, Michigan, Montana, Nevada, Oklahoma, and Wyoming, have held that *Davis* applies pre-waiver, as well.

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ARGUMENT

Collins' brief in opposition is as significant for what it doesn't say as for what it does. For the most part, Collins does not even engage the substance of the State's petition. Specifically, she does not dispute –

- that there is a clear and established split of authority concerning whether the clear-invocation rule of *Davis v. United States*, 512 U.S. 452 (1994), applies pre-waiver as well as post-waiver;
- that the split results directly from confusion over the meaning of this Court's own opinion in *Davis*;
- that the practical implications of the Question Presented are very real, for law enforcement officers and suspects, alike;
- that the policies that drove this Court's decision in *Davis* – "clarity" and "ease of application" for officers in the field – apply to precisely the same extent pre-waiver as post-waiver; and
- that the compact and undisputed record in this case makes resolution of the Question Presented simple and straightforward.

That much, therefore, seems to be common ground.

Rather than tackling the State's arguments on the merits, Collins labors mightily to convince the Court that this case is the "wrong vehicle for deciding the question presented." Br. in Opp. 14. Collins' "wrong vehicle" argument has two components, neither of which has any merit. First, she asserts repeatedly that the question of *Davis*' applicability was not presented to the state courts. *Id.* at 1, 14-16. That, we will show, is objectively and verifiably untrue. Second, as we anticipated she would (Pet. 8-11), Collins seeks to recharacterize the Court of Criminal Appeals' decision as turning not on *Davis* but, instead, on a run-of-the-mill, totality-of-the-circumstances-based voluntariness analysis. Br. in Opp. 16-18. There, too, Collins is just wrong. We will address Collins' arguments in turn.

I. The *Davis* Issue Was Both Presented To And Decided By The State Court Whose Decision This Court Is Asked To Review.

Collins' persistent suggestion that the question of *Davis*' applicability was not raised or addressed in the state courts is, with respect, baffling. She repeats the charge time and again - going so far as to make a jurisdictional argument out of it. Br. in Opp. 1. First, as to presentation, she says that the *Davis* issue "was never raised in the state courts below." *Id.* at 14; *see also id.* at 4 ("never presented"). That is categorically untrue. It is not even debatable. Both during the suppression hearing in the trial court and in its brief to the Court of Criminal Appeals - whose decision this Court is asked to review - the State repeatedly argued that *Davis* controlled the analysis. During the suppression hearing alone, the prosecutor referenced *"U.S. v. Davis"* at least four times for the proposition that a suspect's request for an attorney "has to be unequivocal and unambiguous." Pet. 4-5; App. 20a, 21a, 23a (citing *Davis*). The State's brief to the Court of Criminal Appeals is likewise littered with citations to *Davis*; there, the State contended that because Collins had "made no unequivocal and unambiguous invocation of her right to counsel" as required by *Davis*, the trial court was wrong to employ the *per se* rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), to test the validity of Collins' waiver. Br. of Appellant 1; *see also id.* at 11, 12, 15, 16, 17, 18, 19, 20, 23 (citing *Davis* to show that Collins' ambiguous statement did not trigger *Edwards*' prophylactic rule). Indeed, in her responsive brief to the Court of Criminal Appeals, Collins herself faulted the State for citing *"Davis* and/or the *Davis* standard" *too often* - "twenty-six (26) times in its brief." Br. of Appellee 15.[1] Ultimately, and somewhat schizophrenically, Collins correctly acknowledges here that the State "relied on

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[1] Collins' Rule 14.1(g)(i) argument is groun 'less. The petition's procedural-history discussion (Pet. 3-11) is chock full of citations specifying precisely when, where, and how the *Davis* issue was raised and resolved.

Davis as the controlling authority in this case at the suppression hearing" and "zealously" pressed its *Davis* argument in the Court of Criminal Appeals. Br. in Opp. at 5, 8-9.[2]

Second, as to consideration, Collins asserts that "neither the Alabama Supreme Court nor the Court of Criminal Appeals addressed" the matter of *Davis'* applicability. Br. in Opp. 15. Again, patently false. In fact, the Court of Criminal Appeals - here, "the state court that rendered the decision [this Court has] been asked to review," *Adams v. Robertson*, 520 U.S. 83, 86 (1997) - addressed the *Davis* question at length and in detail.[3] If it *seems* from Collins' brief in opposition that the Court of Criminal Appeals didn't consider *Davis*, it is only because Collins studiously avoids any mention of that court's extended discussion (referenced in the State's petition, Pet. 7-8, 14-15) of the *Davis* issue. To eliminate any uncertainty, we quote here the relevant portion of the Court of Criminal Appeals' decision *in toto*:

> The State contends that *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), mandates a reversal of the trial court's ruling. In *Davis*, the United States Supreme Court held that, after a suspect waives his *Miranda* rights, questioning must cease during an interrogation only when the suspect makes an unambiguous and unequivocal invocation of the right to counsel. The United States Supreme Court did not

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[2] It was not necessary, as Collins seems to suggest (Br. in Opp. 16), for the State to feature in the lower courts the split of authority concerning *Davis'* pre-waiver applicability. The Alabama Court of Criminal Appeals does not exist to resolve interstate disagreements concerning federal constitutional questions; this Court does. This case unquestionably arose in the pre-waiver setting, and the State expressly contended that *Davis* should control. That is plainly sufficient.

[3] That the Alabama Supreme Court did not address the *Davis* issue in its summary order quashing certiorari (Br. in Opp. 1, 15) is irrelevant. *See* R. Stern, et al., *Supreme Court Practice* 168 (8th ed. 2002) ("An order of a court of last resort declining to review a case is not ordinarily the judgment that is reviewable under §1257(a); in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction.").

in *Davis* create a requirement that officers ask clarifying questions when an ambiguous assertion of the right to counsel was made, although the Court acknowledged that asking questions for clarification would often be good practice for officers. In *Davis*, the suspect made an equivocal statement regarding counsel after he had already waived his *Miranda* rights. *Davis*, 512 U.S. at 461, 114 S. Ct. 2350 ("We therefore hold that, *after* a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." (emphasis added)). This Court has not specifically considered whether *Davis* applies to pre-waiver situations, but other appellate courts have considered this issue. We agree with the analysis and decision as discussed in *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557 (2004), and we adopt it here.

The Court in *Freeman* stated:

> "We are persuaded by the reasoning of the court in *State v. Leyva*, 951 P.2d 738 (Utah 1997), which distinguishes between an ambiguous response to an initial *Miranda* advisement and an equivocal post-waiver invocation. The Supreme Court of Utah declined to apply *Davis* to an ambiguous pre-waiver response, concluding that *Davis* was limited to a post-waiver ambiguous invocation of rights. *Id.* at 745. According to the Utah court, that scenario is an 'entirely separate' issue from an ambiguous pre-waiver invocation. *Id.*
>
> "Noting that *Davis* did not 'address' or 'extend to prewaiver scenarios ....', the Utah court said that '*Davis* made clear that its holding applied only to a suspect's attempt to *reinvoke* his *Miranda* rights "*after* a knowing and voluntary waiver" of the same.' *Id.* (quoting *Davis*, 512 U.S. at 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362). Therefore, the Utah court concluded that an officer faced with an ambiguous response to an initial

> advisement of *Miranda* rights, i.e., at the pre-waiver stage, is limited to posing questions designed to clarify the suspect's ambiguous response. *Id. Accord State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (adopting *Leyva* and concluding that '[t]he *Davis* holding obviously applies to instances where suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights. *Davis*, in sum, applies to an equivocal postwaiver invocation of rights.').
>
> "We agree with the Utah court that a careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights. Based on the foregoing, we decline to apply the rationale of *Davis* to our analysis of appellant's silence, because the silence occurred in a pre-waiver context."

Freeman, 158 Md. App. at 428-29, 857 A.2d at 572-73.

Therefore, we hold that *Davis* does not apply to this case. Collins's questions were directed to the delay involved in obtaining a lawyer, and she asked them before she signed the waiver-of-rights form. Because Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity. The United States Supreme Court's decision in *Davis* did not preclude the trial court from granting the relief Collins requested in her motion to suppress. To the contrary, because Collins asked, "And I *will have to wait* til when?" (Supp. R. 15) (emphasis added), and because the officer ignored the question, there remained an ambiguity regarding whether Collins wanted to talk to an attorney. We find that, under the

> facts of this case, the officer had a duty to clarify on the record whether Collins wanted to contact her own attorney, whether she was indigent and needed appointed counsel, or whether she wanted to waive her *Miranda* rights and answer questions. From the record before us, we cannot find the knowing and voluntary waiver of rights required by *Miranda*.

App. 10a-12a.

There is simply no doubt that the Court of Criminal Appeals - again, the court whose decision this Court is asked to review, *see Adams*, 520 U.S. at 86 - squarely addressed the question whether *Davis* should be extended to apply pre-waiver as well as post-waiver. Collins' contention to the contrary is baseless and, frankly, desperate.

II. The State Courts Decided This Case On *Davis* Grounds, Not Ordinary Voluntariness Grounds.

Collins' second angle - which we anticipated (Pet. 8-11) - is to suggest that "this case was not decided on *Davis*" grounds (Br. in Opp. 16) and that, instead, the "real issue" is "whether Collins understood her *Miranda* rights in light of the totality of the circumstances" (*id.* at 9). Collins is just wrong about that, as the evidence overwhelmingly demonstrates. As an initial matter, there is the extended discussion of *Davis* quoted above and the fact that on the heels of that discussion, the Court of Criminal Appeals concluded as follows: "Therefore" - that is, because we are dealing here with pre-waiver ambiguity - ***"we hold that* Davis *does not apply to this case."*** App. 12a (emphasis added). That, notably, is the only place in which Court of Criminal Appeals purported to "hold" anything. Collins' contrary assertion (unsupported by any citation) that the court's "holding" is that she "did not knowingly and intelligently waive here *Miranda* rights" under the totality of the circumstances (Br. in Opp. 17) cannot be squared with the record. The Court of Criminal Appeals didn't say that; indeed, it said just the opposite, *i.e.*, that the central question in the case (the question on which its "hold[ing]" turns) is the applicability of *Davis*.

The *Davis* "hold[ing]" aside, Collins has also completely failed to come to grips with the evidence cited in the petition. There, we explained that the language and structure of the state courts' decisions give rise to only one "fair reading" - namely, that "both the trial court and the Court of Criminal Appeals applied a *per se* rule that tied the 'voluntariness' - and thus the validity - of Collins' waiver singularly and inextricably to the officers' failure to terminate the interview or to ask clarifying questions following Collins' ambiguous statement about counsel." Pet. 9. For support, we pointed first to specific language in the lower courts' opinions that, standing alone, makes clear that the case was decided "on the basis of a *per se* rule, not a totality-based voluntariness analysis." Pet. 9-10 (*e.g.*, "the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel"; "[t]he officers' failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature *prevents us from determining* that Collins's signature on the form satisfied the State's burden of proving that she knowingly and voluntarily relinquished her rights" (quoting App. 6a, 10a)). Rather than making some effort to deal with that language in her opposition, Collins simply ignores it. Second, we observed in the petition that if the Court of Criminal Appeals *had* concluded that Collins' waiver "was involuntary in the totality-of-the-circumstances sense, there would have been no need whatsoever for it to consider *Davis*' applicability (which, of course, it did at length and in detail)." *Id.* at 10. The fact, we said, that "the court went ahead and resolved the *Davis* question demonstrates that the *Davis* question - and not a free-floating voluntariness analysis - drove its decision." *Id.* Again, no response from Collins.

Even in the face of the Court of Criminal Appeals' detailed discussion of - and self-described "hold[ing]" concerning - *Davis*' applicability and the other textual and structural indicators we have highlighted, Collins persists in her assertion that this is actually a totality-of-the-circumstances case. Thus, Collins says in her opposition that factors bear-

ing on a totality-based voluntariness analysis should include "the background, experience and conduct of the accused" as well as "the conduct of the[] police," and emphasizes that at the time of her interrogation "Collins was barely twenty-one years old, with no prior experience with the criminal justice system." Br. in Opp. 1, 6, 7-8. All of that may well be true, *but it only serves to prove our point that the Court of Criminal Appeals' decision is not based on a totality-based voluntariness analysis.* There is *no* mention in that court's opinion of the various contextual considerations to which Collins refers. No discussion of Collins' age or experience; no suggestion of mental duress; no hint of police coercion. By contrast, the Court of Criminal Appeals' opinion, as we have shown, turns on a single fact - the officers' "failure to terminate the interview or to ask clarifying questions following Collins' ambiguous statement about counsel." Pet. 9.

In the end, Collins points to only two passages in support of her totality-of-the-circumstances reading of the Court of Criminal Appeals' opinion. Neither is availing. The first (Br. in Opp. 9-10) is nothing more than a throat-clearing block-quote of the ordinary voluntariness standard. The second (*id.* at 10) is simply a summary of the *Miranda* colloquy between Collins and the interviewing officers, including, specifically, Collins' ambiguous statement concerning counsel. The Court of Criminal Appeals' recitation of the colloquy, however - and particularly its emphasis on the officer's failure to answer Collins' question - hardly suggests a totality-of-the-circumstances approach. By contrast, in the very next paragraph, the court expressly "agree[d]" with the trial court's determination that "the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel." App. 6a (emphasis added).

In sum: While perhaps not a portrait of clarity, the Court of Criminal Appeals' ruling, by its own terms, turns solely on Collins' ambiguous statement about counsel, *not* on some

gestalt analysis of the various contextual factors that constitute a freewheeling, totality-based voluntariness inquiry.[4]

* * *

There is one final point. The root of Collins' error here – an error that infects her entire vehicle-based argument – is her misunderstanding of the relationship between the *Davis/Edwards* analysis, on the one hand, and simple, totality-based voluntariness, on the other. Collins persistently tries to separate the two and then argue that the State is estopped from arguing one or the other. She says, for instance, that "[t]his case is about the standard for waiving the right to counsel, not the standard for invoking it" and, therefore, that "*Davis* does not apply." Br. in Opp. 16. But as we have explained in some detail (Pet. 10, 27-28) the invocation and waiver issues are intertwined. Specifically, resolution of the invocation question – *i.e.*, the determination whether a suspect has unambiguously invoked her right to counsel as required by *Davis* – establishes which of two very different waiver rules applies. On the one hand, where a suspect is Mirandized and then (without invocation) waives, the question is whether the waiver was voluntary, knowing, and in-

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[4] The Court of Criminal Appeals' citation to *State v. McDevitt*, 484 So. 2d 543 (Ala. Crim. App. 1985), does not aid Collins' effort to recharacterize this as a totality-of-the-circumstances case. Br. in Opp. 11-12, 17. First, *McDevitt* is quite expressly *not* a totality decision; in fact, the court there emphasized that "the record offers no insight into McDevitt's background or experience, which a court usually considers in deciding whether a waiver was knowingly made." 484 So. 2d at 548. Like this case, *McDevitt* was decided on the basis of a *per se* prophylactic rule requiring police officers, *as a matter of federal constitutional law*, to clarify ambiguities in suspects' statements concerning counsel. *Id.* at 549 ("[The officer] should have made an inquiry to clarify the ambiguity and to specifically advise McDevitt, at that time, that appointed counsel would be provided, if desired, before questioning proceeded."). Second, as Collins herself makes clear, *McDevitt*'s *per se* clarify-or-terminate rule is, like the rule applied in this case, inconsistent with at least one view (indeed, the prevailing view, *see* Pet. 18-21) of *Davis*. Br. in Opp. 11 ("The State's representation to the lower courts that under *Davis*, a police officer need not ask clarifying questions on these facts, was mistaken and contrary to" *McDevitt*).

telligent in the *Johnson v. Zerbst*, 304 U.S. 458 (1983), totality-of-the-circumstances sense. On the other hand, where a suspect actually invokes her right to counsel under *Davis*, she obtains the benefit of a more stringent rule (under *Edwards*) that renders any subsequent waiver *per se* invalid, regardless of real-world voluntariness. "The point," as we have said, "is that where *Edwards*' extra protection – its 'second layer of prophylaxis' – is triggered by a suspect's invocation, the waiver analysis shifts dramatically from one that requires the State to demonstrate validity under *Zerbst* to one that conclusively presumes the waiver invalid (no matter how voluntary, knowing, and intelligent in the *Zerbst* sense)." Pet. 28. From the very outset, the State's position here has been (1) that *Davis* applies to Collins' ambiguous statement about counsel and, therefore, that *Edwards*' *per se* rule does not; (2) that, accordingly, the default totality-based voluntariness analysis governs; (3) that under a totality-based analysis, Collins' waiver was voluntary; and, critically, (4) that the state courts decided the case on *Davis* grounds and, therefore, never made a proper totality-based voluntariness inquiry. That remains our view.[5]

CONCLUSION

The petition for certiorari should be granted.

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[5] Collins' confusion concerning the interplay between the invocation and waiver issues is the source of her misguided argument that the State "abandoned" arguments in its certiorari petition to the Alabama Supreme Court. Br. in Opp. 18-19. Collins faults the State for "focus[ing] entirely on the totality of the circumstances" in its cert petition and for arguing there that the Court of Criminal Appeals had incorrectly fixated on the officers' failure to answer Collins' question about counsel. *Id.* But in the context of the litigation, that position makes perfect sense. Our position has always been that an *Edwards*-like *per se* rule is inappropriate here and that, instead, the lower courts should have engaged in a traditional totality-based analysis (which, we have always said, Collins' waiver would survive). The point of our petition to the Alabama Supreme Court was simply that the lower courts had used the wrong standard; hence, what Collins assails as the "focus" on "the totality of the circumstances."

Respectfully submitted,

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